

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Apr 04 2022 06:32 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

ERIC DEAN WERRE,

Appellant

v.

THE STATE OF NEVADA,

Respondent

Docket No. 84234

Appeal From Order Denying Petition for
Writ of Habeas Corpus (Post-Conviction)

Third Judicial District Court, Lyon County, Nevada
Case No. 21-CV-00291

The Honorable Leon Aberasturi, District Court Judge

RESPONDENT'S APPENDIX

Michael Lasher, Esq.
827 Kenny Way
Las Vegas, NV 89107
(510) 507-2869
State Bar #13805

Attorney for Appellant
Eric Dean Were

Stephen B. Rye
District Attorney
Lyon County Dist. Attorney's Office
31 S. Main Street
Yerington, Nevada 89447
State Bar #5761
(775) 463-6511

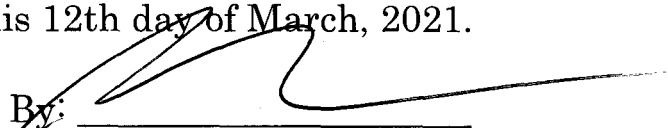
Attorney for Respondent
State of Nevada

Index To Appendix

Petition for Writ of Habeas Corpus Post-Conviction	1
Answer to Petition for Writ of Habeas Corpus (Post-Conviction)	47
Reply to State’s Answer to Petition for Writ of Habeas Corpus	59
Unconditional Waiver of Preliminary Hearing	72
Transcript of Proceedings, Arraignment Hearing, March 2, 2020	73
Judgment of Conviction	89
Transcript of Proceedings, Sentencing Hearing, April 20, 2020	93
Order Clarifying Oral Pronouncement at Sentencing	120

This Petition is made and based upon all the following Points and Authorities, the papers and pleadings on file herein, the exhibits attached hereto, and any oral argument required by the Court at the time set for the hearing of this matter. Petitioner hereby incorporates all facts, exhibits, declarations, and claims of constitutional violations alleged elsewhere in this petition as if fully set forth herein and further incorporates the allegations in each claim into every other claim. The facts that support these claims, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for necessary investigation and experts and an evidentiary hearing are described below.

DATED this 12th day of March, 2021.

By: 
MICHAEL LASHER, ESQ.
Nevada Bar No. 13805
Michael Lasher LLC
827 Kenny Way
Las Vegas, Nevada 89107
(510) 507-2869
Attorney for Petitioner

CLAIM I

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE UNDER THE SIXTH AMENDMENT BY FAILING TO PROPERLY ADVISE WERRE OF HIS DEFENSES, FAILING TO PROPERLY NEGOTIATE A PLEA, AND FAILING TO ADEQUATELY ARGUE AT SENTENCING

An information against Eric Werre was filed on February 25, 2020. Petitioner's Appendix page 2 (hereafter in the format "PA 2"). Less than a week later, appointed counsel entered a guilty plea agreement. PA 23. Counsel conducted no investigation into factual or legal defenses in this short time. As such, counsel rendered ineffective assistance by failing to properly negotiate a plea, failing to make adequate arguments at sentencing, failing to present mitigation, and failing to properly advise Werre of his defenses.

Legal Framework

To satisfy *Strickland's* two-prong inquiry, counsel's representation must fall "below an objective standard of reasonableness" and there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Constitutional deficiency is

necessarily linked to the legal community's practice and expectations: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. Nevada's jurisprudence is in accord. *See, e.g., Lozada v. State*, 110 Nev. 349, 353 (1994); *Davis v. State*, 107 Nev. 600, 601-02 (1991); *Bennett v. State*, 111 Nev. 1099, 1108 (1995); *Kirksey v. State*, 112 Nev. 980, 987 (1996). Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

The United States Supreme Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. *Hill* [*v. Lockhart*], 474 U.S. [52], at 57, 106 S.Ct. 366 [1985]; see also *Richardson*, 397 U.S., at 770-771, 90 S.Ct. 1441." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). Counsel is obligated to advise the client of "the advantages and disadvantages of a plea agreement." *Libretti v. United States*, 516 U.S. 29, 50-51 (1995). *Brown v. State*, 110 Nev 846, 849 (1994) held that "a properly zealous advocate must do all he can to defend is client."

Factual Background

On March 2, 2020, Werre entered guilty pleas, less than a week after the information was filed on February 25, 2020. PA 23; PA 2. The District Court told Werre that his exposure on Count I was two to 15 years and the sentence was non-probationable. The District Court further advised that the exposure on Count II was also two to 15 years and one to ten years on both Counts III and IV. PA 11 – 13.

The PSI recommended 36 to 120 months for both Counts I and II, without specifying whether they should run concurrent or consecutive. The PSI also recommended 16 to 72 months for both Counts III and IV and that “the State will recommend that two counts of Possession of a Stolen Firearm be run concurrent to each other.” PA 39.

At sentencing on April 20, 2020, defense counsel asked for a sentence closer to what was specified in the PSI. Specifically, defense counsel asked the court to impose 36 to 120 months in Count I, “36 on Count II, 36 months required 20 months to run concurrent rather than consecutive to Count I. On Count III, 16 to 72 months as laid out on the PSI to run concurrent instead of consecutive to Counts I and II. And 16 to 72 months on Count IV to run concurrent instead of consecutive to

Counts I, II, III, IV.” PA 65. Defense counsel argued that it would “victimize the victim” to impose a lengthy sentence on Werre because the sooner he was released the sooner he can begin working and paying restitution. PA 66. Defense counsel also argued that Werre has a good support network, that of his father and fiancée. PA 66. Once Werre is released, they will get him a job and keep him out of trouble. PA 67. Finally, defense counsel argued that the sentences should run concurrently because they were all part of a common scheme or plan. “Your honor, Count II specifically applies to the burglary or the inference in order to steal the firearms. When the burglary occurred, it was to steal the firearms as laid out in Counts III and IV being part of the same act as laid out in Counts II. And all that comes together to provide the cash to the Defendant, the Defendants for the controlled substances that became the basis for Count 1.” PA 67. Defense counsel informed the District Court that Werre plans to enroll in drug treatment programs in prison and upon his release. PA 67.

On April 20, 2020, Werre was sentenced as follows:

COUNT 1 (trafficking in a controlled substance) to a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM parole eligibility of SEVENTY-TWO (72) MONTHS;

COUNT 2 (principle to burglary) to a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM parole eligibility of SEVENTY-TWO (72) MONTHS, CONSECUTIVE to COUNT 1;

COUNT 3 (possession of a stolen firearm) to a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS, CONCURRENT to COUNTS 1 AND 2;

COUNT 4 (principle to possession of a stolen firearm) to a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS, CONCURRENT to COUNTS 1 AND 2

As such, Werre's aggregate total sentence was one-hundred-forty-four months (12 years) to three-hundred-sixty months (30 years). PA 73 et seq.

AB 236 extensively restructured crimes and penalties in Nevada.

After July 1, 2020, trafficking requires a minimum of 100 grams of a Schedule I or Schedule II substance. Today, less than 100 grams is mere possession, with 14 to 28 grams a Category C felony with exposure of one to five years. All possession offenses (except of GHB) are now probation eligible. As well, burglary is now divided by type of structure, with an outbuilding defined as a Category D felony and a commercial building a Category C felony. Property offenses now have a graduated penalty structure for increasing values, with loss of up to \$25,000 defined as a Category C felony.

Analysis

Failing to adequately negotiate a plea bargain

Trial counsel rendered ineffective assistance in failing to adequately negotiate a plea bargain. In light of the impending extensive changes in crimes and penalties, trial counsel should have negotiated a better plea. Other attorneys did exactly this. Attorney Orrin Johnson negotiated a plea more in line with AB 236 for his client Justin Manley (Second Judicial District Case No. CR20-2115.) Werre's counsel should have done the same. *Brown v. State*, 110 Nev 846, 849 (1994) held that "a properly zealous advocate must do all he can to defend his client."

Had counsel adequately negotiated a plea in line with the ameliorative changes wrought by AB 236, it is reasonably probable that Werre would have achieved a better result.

Failing to adequately argue at sentencing

Trial counsel rendered ineffective assistance in failing to marshal strong arguments for the sentence recommended in the PSI. As a result, Werre's minimum parole eligibility on Count 1 alone was three years beyond that recommended in the PSI. Specifically, defense counsel totally failed to mention AB 236 and the sentence Werre could have received had the crime been committed after July 1, 2020, a mere

six months after the events forming the basis of the allegations. After July 1, 2020, Werre could not have even been charged with trafficking, as alleged in Count 1. He would have only been facing mere possession, with 14 to 28 grams amounting to a Category C felony carrying an exposure of one to five years with the possibility of probation and not mandatory prison. Furthermore, after July 1, 2020, the Count 2 burglary charge arguable would be classified as a Category D felony because the structure entered was an outbuilding. A Category D felony carries a sentence of one to four years. NRS 193.130. Yet Werre was sentenced to 6 to 15 years on Count II. Again, his minimum sentence is two years more than the maximum sentence under the current schema.

Yet defense counsel did not mention at sentencing any of the ameliorative changes wrought by AB 236. Nor did counsel argue that as a matter of equity and as mandated by the Eighth Amendment's prohibition on cruel and unusual punishment (see below) that the far-ranging, impending changes to Nevada's criminal law and penalties required a lesser sentence, which would also happen to be closer in line with the recommendations in the PSI.

Defense counsel also failed to argue that Werre's culpability was minimal compared to that of Atkins. There was no DNA or other physical evidence tying Werre to the burglary of the gun storage facility. There was no evidence, such as Werre's possession of keys, indicating that he had access to the master bedroom in Atkins' residence at 2920 West Fir Street, where the majority of the firearms and methamphetamine was located and which was locked to prevent Atkins' kids from having access. Furthermore, when Werre was arrested he had only a 2.5 gross gram baggie of methamphetamine on his person, which is an amount consistent with personal use. PA 36. Finally, when Werre's father's house in California was searched, no incriminating evidence was found.

In contrast, there was substantial evidence of Atkins' culpability, which gave her a motive to lie to the police in hopes of a lesser sentence.¹ For instance, Atkins lived very close to gun storage facility and her home was the repository for all of the stolen weapons and the methamphetamine. Her DNA was found inside of the gun storage

¹ In fact, Atkins, clearly the mastermind of the crimes, was never even sent to prison, while Werre's minimum parole eligibility is still eleven years in the future.

facility. As well, police recovered a sheet of paper in Atkins' handwriting indicating the stolen guns which she had already sold and at which price. Plus, she had thousands of dollars of cash and numerous firearms on her person when arrested. PA 35 – 38. As such, there was little evidence of Werre's criminality and significant evidence of Atkins' culpability, which should have been argued by defense counsel at Werre's sentencing.

It is reasonably probable that had defense counsel adequately argued at sentencing, Werre would have received the sentence recommended in the PSI.

Failing To Present Mitigation

Trial counsel has a duty to present mitigation at sentencing. *Brown v State*, 110 Nev 846, 851 (1994): "However, when a judge has sentencing discretion, as in the instant case, possession of the fullest information possible regarding the defendant's life and characteristics is essential to the selection of the proper sentence. *Wilson v. State*, 105 Nev. 110, 115, 771 P.2d 583, 586 (1989) (citing *Lockett v. Ohio*, 438 U.S. 586, 603, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)). See also, *Weaver v. Warden, Nevada State Prison*, 107 Nev. 856, 858-59 (1991)

(ineffective for counsel to fail to present evidence of PTSD at sentencing); *Peters v. State*, 130 Nev. 1229 (2014) (assuming without deciding that there is a duty to present mitigation in a non-capital case); *Greenberg v. State*, 124 Nev. 1471 (2008) (same). See also, *Porter v. McCollum*, 558 U.S. 30 (2009) (ineffective assistance for failure to present psychosocial history records which indicate trauma).

In the instant case, trial counsel merely presented one emailed note from Werre's father, which stated that Werre will have work upon his release, that they have discussed drug rehabilitation, and that Werre will have a healthy environment to live in upon his release. PA 45.

Trial counsel should have also argued that Werre has no convictions for burglary or gun charges, indicating that he was at the wrong place at the wrong time. That is, Werre was present at Atkins' home merely to purchase narcotics for personal use, consistent with the 2.5 grams found upon his person at arrest. Werre was simply not a gun and drug runner and should not have been sentenced accordingly.

Had defense counsel performed adequately, it is reasonably probable that the court would have sentenced Werre in line with Parole and Probation's recommendation in the PSI.

Failing to Adequately Advise of Defenses

Trial counsel also failed to advise Werre of his possible defenses and strengths of his case, such that his decision to plead guilty was not made knowingly, voluntarily, and intelligently. In a slightly different context, *Banka v. State*, 476 P.3d 1191 (2020) held that a plea was not knowing, voluntary, and intelligent when the defendant was not informed of a mandatory minimum fine.

In this case, trial counsel failed to advise Werre that Atkins' statements must be corroborated before they were used against him and that there was little or no evidence of corroboration in this case. "A conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense." NRS 175.291(1).

Yet there was no corroboration which would have allowed the introduction of Atkins' statements. There was no DNA or other

evidence tying Werre to the burglary of the gun storage facility. There was no evidence, such as Werre's possession of keys, that he had access to the master bedroom in Atkins' residence at 2920 West Fir Street, where the majority of the firearms and methamphetamine was located and which was locked to prevent Atkins' kids from having access. Furthermore, when Werre was arrested he had only a 2.5 gross gram baggie of methamphetamine on his person, which is an amount consistent with personal use. PA 36. Finally, when Werre's father's house in California was searched, no incriminating evidence was found. Thus, there was no evidence to corroborate Atkins' statements against Werre, such that they could not have been used against him at trial. And without her statement, there was little remaining evidence connecting Werre to the more serious crimes.

In contrast, there was substantial evidence of Atkins' culpability, which gave her a motive to lie to the police in hopes of a lesser sentence.² For instance, Atkins lived very close to gun storage facility and her home was the repository for all of the stolen weapons and the

² In fact, Atkins, the mastermind of he crimes, has already served her sentence and is out of custody, while Werre's minimum parole eligibility is still eleven years in the future.

methamphetamine. Her DNA was found inside of the gun storage facility. As well, police recovered a sheet of paper in Atkins' handwriting indicating the stolen guns which she had already sold and at which price. Plus, she had thousands of dollars of cash and numerous firearms on her person when arrested. PA 35 – 38. As such, there was little evidence of Werre's criminality and significant evidence of Atkins' culpability, all of which could have been presented at trial.

Defense counsel also failed to advise Werre of other potential defenses concerning the classification of methamphetamine. In Nevada, methamphetamine can be either Schedule I or Schedule II, depending on its provenance. Compare NAC 453.510(7) (Schedule I if "street" meth) with 453.520(4)(c) (Schedule II if produced in a DEA-certified lab).³ If Nevada allows a bifurcated classification of methamphetamine, then the State must prove as an element of the crime that the substance possessed by a defendant is "street," and not medical grade, methamphetamine to support a conviction of trafficking in a Schedule I substance. See *Figueroa-Beltran v. United States*, 136 Nev. Adv. Op.

³ Only Nevada and Oregon have this bifurcated scheme. The federal government and the other 48 states classify methamphetamine as Schedule II because it has medically approved uses. See 6 AA 464, chart of the classification schemes of all jurisdictions.

45 (2020), which held that “a substance’s identity is an element of the crime in the requirement that the State must be able to establish the identity of the drug and because the drug’s identity may impact the applicable sentence.” As such, the jury must be instructed to make factual findings regarding the type of methamphetamine at issue and prosecutors must prove beyond a reasonable doubt that the substance is in fact Schedule I for the more severe penalties to apply.

Trial counsel could have also advised Werre of other pre-trial motions that could have attacked Nevada’s listing of methamphetamine as Schedule I. The Supremacy Clause of the United States Constitution compels that methamphetamine be classified as Schedule II because the federal Controlled Substances Act so classifies it. See 21 U.S.C.A. § 812. Methamphetamine is not classified as Schedule I because it is used to treat certain medical conditions, such as obesity and ADHD.

The federal Controlled Substances Act expressly provides:

No provision of [the Act] shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, *unless there is a positive conflict between that provision ... and that State law so that the two cannot consistently stand together.*

21 U.S.C. § 903 (emphasis added).

Federal law preempts state law if there is a conflict between state and federal regulation. *United States v. 4,432 Mastercases of Cigarettes, More or Less*, 448 F.3d 1168, 1189 (9th Cir. 2006).

In the instant case, there is a positive conflict between the controlling federal law and the minority position articulated by the Lyon County District Attorney so that the two cannot consistently stand together. 21 U.S.C. § 903. Under the Supremacy Clause, the federal classification is controlling. *Rolf Jensen v. District Court*, 128 Nev. 441, 445 (2012) explains that “Conflict preemption analysis examines the federal statute as a whole to determine whether a party’s compliance with both federal and state requirements is impossible or whether, in light of the federal statute’s purpose and intended effects, state law poses an obstacle to the accomplishment of Congress’s objectives.” In other words, an obstacle can amount to a direct conflict.

Defense counsel should have advised Werre that a pre-trial motion could have argued that the Supremacy Clause compels that methamphetamine be classified as Schedule II in Nevada, which would have drastically reduced his sentence. A pre-trial motion could have

argued that since the State always charges meth as Schedule I, Nevada's schema is a de facto direct conflict with federal law. Furthermore, Nevada's bifurcated scheme poses an obstacle to Congress's objectives because it curtails people without health care from self-treating their ADHD and obesity, the medically indicated uses of methamphetamine. See <https://americanaddictioncenters.org/adult-addiction-treatment-programs/self-medicating>. That the NAC violates the Supremacy Clause is shown by the fact that only Nevada and Oregon have two classifications for methamphetamine, depending on the circumstances of its manufacture. Thus, 48 of the 50 states recognize that the federal classification is controlling. In fact, the majority of the state statutes explicitly refer to the federal statute. Methamphetamine thus must be classified as Schedule II because this is consistent with the federal Controlled Substances Act, 21 U.S.C.A. § 812.

In sum, trial counsel rendered ineffective assistance in failing to advise Werre of the strength of his case and possible defenses prior to his guilty plea a mere week after the information was filed. These

omissions rendered Werre's plea not knowing, voluntary, and intelligent.

Had trial counsel been competent and so informed Werre, it is reasonably probably that he would not have plead guilty and would have had a better result at trial.

In the alternative, Werre's guilty plea should be set aside. NRS 176.165 allows the withdrawal of a guilty plea in certain circumstances. "To correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea."

In the instant case, it is a manifest injustice that Werre was sentenced to 12 to 30 years while the mastermind never spent one day in state prison. It is a manifest injustice that had the crimes been a mere six months later, Werre's maximum sentence would have been a fraction of what he now faces. Werre was sentenced to 12 to 30 years. Yet six months later, he would have faced only three to ten years: Count I's exposure is currently one to five years and Count II's exposure is one to four years; if run consecutively, this amounts two to nine years. Counts III and IV's exposure remains three to ten years, which the

District Court ran concurrent to Counts I and II. His convictions must be set aside.

CLAIM II

WERRE'S THIRTY YEAR SENTENCE VIOLATES THE EIGHTH AMENDMENT IN LIGHT OF THE OVERHAUL OF NEVADA'S CRIMINAL CODES

In light of the far-reaching ameliorative changes to crime and punishment wrought by AB 236, Werre's punishment violates the Eighth Amendment's requirement that a punishment be in line with society's evolving standards of decency. Werre was arrested a mere six months before July 1, 2020, at which date he could not have been charged with trafficking, as alleged in Count 1. He would have only been facing mere possession, with 14 to 28 grams amounting to a Category C felony carrying an exposure of one to five years with the possibility of probation and not mandatory prison. Yet Werre was sentenced to 6 to 15 years on Count I. As such, his minimum sentence is even more than the maximum under the current schema.

Furthermore, after July 1, 2020, the Count 2 burglary charge may be classified as a Category D felony because the structure entered was an outbuilding. A Category D felony carries a sentence of one to four

years. NRS 193.130. Yet Werre was sentenced to 6 to 15 years on Count II. Again, his minimum sentence is two years more than the maximum sentence under the current schema.

The Eighth Amendment ban on cruel and unusual punishment “flows from the basic ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense. [Citation.]” *Roper v. Simmons*, 543 U.S. 551, 560 (2005), quoting *Weems v. United States*, 217 U.S. 349, 367 (1910). “By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.” *Ibid.*; see *Timbs v. Indiana* __ U.S. __, __; 139 S.Ct. 682, 687 (2019) [Cruel and Unusual Punishment Clause of the Eighth Amendment applies to the states].)

In *Roper*, the United States Supreme Court banned the execution of individuals under 18 years old at the time of their crimes under the Eighth Amendment’s prohibition of cruel and unusual punishment. *Roper, supra*, 543 U.S. at pp. 560-561. The Court emphasized that a national consensus had formed in opposition to the execution of juveniles and those states that permitted the practice administered it infrequently. *Id.* at pp. 564-565. And in prohibiting the death penalty

for the intellectually disabled, the Court stated, “[T]he standard of extreme cruelty . . . itself remains the same, but its applicability must change as the basic mores of society change.” *Atkins v. Virginia*, 536 U.S. 304, 311, fn.7 (2002), citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion.) “[E]volving standards of decency,” in turn, are measured by reference to whether a “national consensus” supports a categorical prohibition on a given punishment. *Atkins, supra*, 536 U.S. at pp. 312-314. To ascertain whether or not such a consensus exists, the Court considers “objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to executions.” *Roper, supra*, 543 U.S. at p. 563.

In Nevada, the legislature saw fit to overhaul crime and punishment, effective a mere six months after Werre’s arrest. This indicates objective indicia of Nevada’s evolving standards of decency, as expressed in its own legislative enactments. Werre was sentenced to 12 to 30 years. Yet six months later, he would have faced only three to ten years: Count I’s exposure is currently one to five years and Count II’s exposure is one to four years; if run consecutively, this amounts two to nine years. Counts III and IV’s exposure remains three to ten years,

which the District Court ran concurrent to Counts I and II. In sum, a mere six months later, Werre's maximum sentence would have been even less than the minimum that he now faces. Such a sentence violates the Eighth Amendment.

CUMULATIVE ERROR

In *Dechant v. State*, 10 P.3d 108, 116 Nev. 918 (2000), this Court reversed the murder conviction based upon the cumulative effect of the errors at trial. In *Dechant*, this Court provided, "[W]e have stated that if the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction." *Id.* at 113 citing *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The Court explained that there are certain factors in deciding whether error is harmless or prejudicial including whether 1) the issue of guilt or innocence is close, 2) the quantity and character of the error and 3) the gravity of the crime charged. *Id.* Based on the foregoing, Werre requests that this Court reverse his convictions.

REQUEST FOR EVIDENTIARY HEARING PURSUANT TO NRS

34.770

NRS 34.770 determines when a petitioner is entitled to an evidentiary hearing:

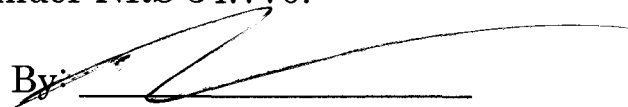
1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.
2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. *Marshall v. State*, 110 Nev. 1328 (1994); *Mann v. State*, 118 Nev. 351, 356 (2002). A petitioner is entitled to an evidentiary hearing if his or her petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. *Marshall, supra*, 110 Nev. at 1331; *See also Hargrove v. State*, 100 Nev. 498, 503 (1984) (holding that “[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing

on factual allegations belied or repelled by the record”). “A claim is ‘belied’ when it is contradicted or proven to be false by the record as it existed at the time the claim was made.” *Mann, supra*, 118 Nev. at 354. The District Court cannot rely on affidavits submitted with a response or answer in determining whether the factual allegations are belied by the record. *Id.* at 354-56. Additionally, the District Court cannot make credibility determinations without an evidentiary hearing. *Id.* at 256 (rejecting suggestion that district court can resolve a factual dispute without an evidentiary hearing and noting that “by observing the witnesses’ demeanors during an evidentiary hearing, the district court will be better able to judge credibility”).

Here, Werre has alleged that trial counsel was ineffective in his handling of the plea and sentencing. As such, there are issues of both credibility and fact and so may not be determined by the district court without an evidentiary hearing. *Mann, supra*, 118 Nev. at 354-56. While the State may claim that all decisions made by counsel were strategic in nature and therefore virtually unquestionable, that is unclear from the record before the Court at this time. Finally, Werre has alleged factual allegations, which if true, would entitle him to relief


and these allegations are not belied by the record. Therefore, Werre is entitled to relief or an evidentiary hearing under NRS 34.770.

By: 
MICHAEL LASHER, ESQ.
Nevada Bar No. 13805
Michael Lasher LLC
827 Kenny Way
Las Vegas, Nevada 89107
(510) 507-2869
Attorney for Petitioner

Verification

Under penalty of perjury, the undersigned declares that he is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge except as to those matters stated on information and belief and as to such matters he believes them to be true. Petitioner personally authorized undersigned counsel to commence this action.

Dated March 12, 2021.

By: 
MICHAEL LASHER, ESQ.
Nevada Bar No. 13805
Michael Lasher LLC
827 Kenny Way
Las Vegas, Nevada 89107
(510) 507-2869
Attorney for Petitioner

PROOF OF SERVICE

IT IS HEREBY CERTIFIED by the undersigned that on the 12th day of March, 2021, I served a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** on the parties listed below via one or more of the methods of service described below

VIA U.S. MAIL


Eric Werre, 1233467
Southern Desert Corr. Center
P.O. Box 208
Indian Springs, NV 89070

Second Judicial District Court
911 Harvey Way #4
Yerrington, NV 89447

Lyon County District Attorney
31 South Main Street
Yerrington, NV 89447

I certify under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on March 12, 2021 at Las Vegas, Nevada

By: 
MICHAEL LASHER, ESQ.
Nevada Bar No. 13805
Michael Lasher LLC
827 Kenny Way
Las Vegas, Nevada 89107
(510) 507-2869
Attorney for Petitioner

1 **PWHC**
2 **MICHAEL LASHER, ESQ.**
3 Nevada Bar No. 13805
4 Law Office of Michael Lasher, LLC.
5 827 Kenny Way
6 Las Vegas, NV 89107
7 Phone: (510) 507-2869
8 Michaellasher2@gmail.com
9 Attorney for Petitioner

7 **DISTRICT COURT**
8 **LYON COUNTY, NEVADA**

9 ERIC DEAN WERRE)
10)
11 Petitioner,)
12 v.) CASE NO: 20-CR-00234
13) HON. LEON ABERASTURI
14 WILLIAM HUTCHINGS, WARDEN,)
15 Southern Desert Correctional Center;)
16 STATE OF NEVADA)
17 Respondents.)
18)
19)

17 **PETITION FOR WRIT OF HABEAS CORPUS**
18 **(POST-CONVICTION)**

- 19
20 1. **Name of institution and county in which you are presently imprisoned or where and**
21 **how you are presently restrained of your liberty:**
22 Southern Desert Correctional Center
23 2. **Name and location of court which entered the judgment of conviction under attack:**
24 Third Judicial District Court, Clark County Nevada.
25 3. **Date of judgment of conviction:**
26 April 28, 2020
27
28 4. **Case number:** 20-CR-00234

1
2 **5. (a) Length of sentence:**

3
4 Petitioner was sentenced as follows:

5 **COUNT 1** to a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a
6 MINIMUM parole eligibility of SEVENTY-TWO (72) MONTHS;

7 **COUNT 2** to a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a
8 MINIMUM parole eligibility of SEVENTY-TWO (72) MONTHS, CONSECUTIVE to
9 COUNT 1;

10 **COUNT 3** to a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a
11 MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS, CONCURRENT to
12 COUNTS 1 AND 2;

13 **COUNT 4** to a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a
14 MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS, CONCURRENT to
15 COUNTS 1 AND 2

16 **AGGREGATE TOTAL of THREE HUNDRED AND SIXTY (360) MONTHS**
17 **MAXIMUM with a MINIMUM PAROLE ELIGIBILITY OF ONE HUNDRED**
18 **FOURTY-FOUR (144) MONTHS.**

19 ONE HUNDRED NINE (109) DAYS credit for time served.

20
21 **(b) If sentence is death, state any date upon which execution is scheduled:**

22 N/A

23 **6. Are you presently serving a sentence for a conviction other than the conviction under**
24 **attack in this motion?**

25 No

26 If "yes," list crime, case number and sentence being served at this time: N/A

27 **7. Nature of offense involved in conviction being challenged:**

28 **COUNT 1:** Trafficking in Schedule I Substances between 14 and 28 grams
(NRS 453.3385(1)(b))

COUNT 2: Principal to Burglary, Gaining Possession of Firearm (NRS 205.060,
205.060(4), 195.020)

COUNT 3: Principal to Stolen Firearm (NRS 205.275, 205.275(2)(c), 195.020)

COUNT 4: Principal to Possession of Stolen Firearm (NRS 205.275,
205.275(2)(c), 195.020)

29 **8. What was your plea?**

Guilty to Counts 1, 2, 3, 4.

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details:

N/A *****

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by:

- (a) Jury _____
- (b) Judge without a jury _____

11. Did you testify at the trial?

N/A

12. Did you appeal from the judgment of conviction?

No.

13. If you did appeal, answer the following:

- (a) Name of court: N/A
- (b) Case number or citation: N/A
- (c) Result: N/A
- (d) Date of result: N/A

14. If you did not appeal, explain briefly why you did not:

Because a guilty plea was entered.

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

No.

16. If your answer to No. 15 was "yes," give the following information:

- (a) (1) Name of court: N/A
- (2) Nature of proceeding: N/A
- (3) Grounds raised: N/A
- (4) Did you receive an evidentiary hearing on your petition, application or motion? N/A
- (5) Result: N/A
- (6) Date of result: N/A

- 1 (7) If known, citations of any written opinion or date of orders entered pursuant
2 to such result: N/A
- 3 (b) As to any second petition, application or motion, give the same information:
- 4 (1) Name of court: N/A
- 5 (2) Nature of proceeding: N/A
- 6 (3) Grounds raised: N/A
- 7 (4) Did you receive an evidentiary hearing on your petition, application
8 or motion? N/A
- 9 (5) Result: N/A
- 10 (6) Date of result: N/A
- 11 (7) If known, citations of any written opinion or date of orders entered
12 pursuant to such result: N/A
- 13 (c) As to any third or subsequent additional applications or motions, give the same
14 information as above, list them on a separate sheet and attach. N/A
- 15 (d) Did you appeal to the highest state or federal court having jurisdiction, the result or
16 action taken on any petition, application or motion? N/A
- 17 (1) First petition, application or motion? Yes No
18 Citation or date of decision:
- 19 (2) Second petition, application or motion? Yes No
20 Citation or date of decision:
- 21 (3) Third or subsequent petitions, applications or motions? Yes No
22 Citation or date of decision:
- 23 (e) If you did not appeal from the adverse action on any petition, application or motion,
24 explain briefly why you did not. (You must relate specific facts in response to this
25 question. Your response may be included on paper which is 8 1/2 by 11 inches attached to
26 the petition. Your response may not exceed five handwritten or typewritten pages in
27 length.)
- 28 N/A
17. Has any ground being raised in this petition been previously presented to this or any
other court by way of petition for habeas corpus, motion, application or any other
post-conviction proceeding? If so, identify:
- (a) Which of the grounds is the same: N/A
- (b) The proceedings in which these grounds
were raised: N/A
- (c) Briefly explain why you are again raising these grounds. (You must relate
specific facts in response to this question. Your response may be included on paper
which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed
five handwritten or typewritten pages in length.) N/A

- 1 18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional
2 pages you have attached, were not previously presented in any other court, state or
3 federal, list briefly what grounds were not so presented, and give your reasons for not
4 presenting them. (You must relate specific facts in response to this question. Your
response may be included on paper which is 8 1/2 by 11 inches attached to the
petition. Your response may not exceed five handwritten or typewritten pages in
length.) N/A
- 5 19. Are you filing this petition more than 1 year following the filing of the judgment of
6 conviction or the filing of a decision on direct appeal? If so, state briefly the reasons
7 for the delay. (You must relate specific facts in response to this question. Your
8 response may be included on paper which is 8 1/2 by 11 inches attached to the
petition. Your response may not exceed five handwritten or typewritten pages in
length.) No. This Petition is timely filed.
- 9 20. Do you have any petition or appeal now pending in any court, either state or federal,
10 as to the judgment under attack? Yes No ..X.....
If yes, state what court and the case number:
- 11 21. Give the name of each attorney who represented you in the proceeding resulting in
12 your conviction and on direct appeal:
- 13 Trial Counsel: Aaron Mouritsen, Esq.
- 14 Appellate Counsel: N/A
- 15 22. Do you have any future sentences to serve after you complete the sentence imposed
16 by the judgment under attack?
- 17 No
- 18 If yes, specify where and when it is to be served, if you know: N/A
- 19
- 20 23. State concisely every ground on which you claim that you are being held unlawfully.
21 Summarize briefly the facts supporting each ground. If necessary you may attach
22 pages stating additional grounds and facts supporting same.
- 23 I. Ground One:
- 24 Petitioner received ineffective assistance of appellate counsel in violation of his
25 right to counsel pursuant to the Sixth Amendment to the Constitution of the United
26 States of America and Article 1 of the Nevada Constitution due to trial counsel's
incorrect advisement as to the consequences of a plea, rendering such plea to be
involuntary and unknowing. See additional pages.
- 27 II. Petitioner requests an evidentiary hearing pursuant to NRS 34.770.
- 28

1 Post-conviction counsel for Petitioner was hired less than thirty (30) days prior to the filing
2 of this Petition and no transcripts have been produced. Therefore, post-conviction counsel has not
3 been able to fully review the record or trial counsel's investigation. Additionally, post-conviction
4 counsel has not been able to conduct her own investigation. However, due to the fact that
5 Petitioner's Judgment of Conviction was entered on October 23, 2019, he must file his initial
6 Petition now so as not to be time barred pursuant to NRS 34.726. Petitioner may raise additional
7 grounds in supplemental pleadings and/or expand on the issues raised in the instant Petition after
8 post-conviction counsel has conducted a full review of the file and transcripts as well as completed
9 investigation.

10 WHEREFORE, petitioner prays that the court grant petitioner relief to which petitioner
11 may be entitled in this proceeding.

12 EXECUTED on the ** day of the month of ** of the year 2021.

13
14 /s/ Michael Lasher
15 **MICHAEL LASHER, ESQ.**
16 Nevada Bar No. 13805
17 Law Office of Michael Lasher, LLC.
18 827 Kenny Way
19 Las Vegas, NV 89107
20 Phone: (510) 507-2869
21 Michaellasher2@gmail.com
22 Attorney for Petitioner

23 VERIFICATION

24 Under penalty of perjury, the undersigned declares that the undersigned is the attorney
25 representing the petitioner named in the foregoing petition and knows the contents thereof; that the
26 pleading is true of the undersigned's own knowledge, except as to those matters stated on
27 information and belief, and as to such matters the undersigned believes them to be true.

28 Dated this 12 thday of March, 2021.

/s/ Michael Lasher
MICHAEL LASHER, ESQ.

Nevada Bar No. 13805
Law Office of Michael Lasher, LLC.
827 Kenny Way
Las Vegas, NV 89107
Phone: (510) 507-2869
Michaelasher2@gmail.com
Attorney for Petitioner

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2 **CERTIFICATE OF SERVICE**

3 **IT IS HEREBY CERTIFIED** by the undersigned that on ** day of ***, 2021, I served a true
4 and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS (POST-**
5 **CONVICTION)** on the parties listed on the attached service list via one or more of the methods
6 of service described below as indicated next to the name of the served individual or entity by a
7 checked box:

8 **VIA U.S. MAIL:** by placing a true copy thereof enclosed in a sealed envelope with postage
thereon fully prepaid, in the United States mail at Las Vegas, Nevada.

9 **VIA FACSIMILE:** by transmitting to a facsimile machine maintained by the attorney or the party
10 who has filed a written consent for such manner of service.

11 **BY PERSONAL SERVICE:** by personally hand-delivering or causing to be hand delivered by
such designated individual whose particular duties include delivery of such on behalf of the firm,
12 addressed to the individual(s) listed, signed by such individual or his/her representative accepting
on his/her behalf. A receipt of copy signed and dated by such an individual confirming delivery of
13 the document will be maintained with the document and is attached.

14 **BY E-MAIL:** by transmitting a copy of the document in the format to be used for attachments to
the electronic-mail address designated by the attorney or the party who has filed a written consent
15 for such manner of service.

16 /s/ Michael Lasher
17 **MICHAEL LASHER, ESQ.**
Nevada Bar No. 13805
18 Law Office of Michael Lasher, LLC.
827 Kenny Way
19 Las Vegas, NV 89107
Phone: (510) 507-2869
20 Michaellasher2@gmail.com
Attorney for Petitioner
21
22
23
24
25
26
27
28

SERVICE LIST

ATTORNEYS OF RECORD	PARTIES REPRESENTED	METHOD OF SERVICE
LYON COUNTY DISTRICT ATTORNEY'S OFFICE 555 E Main Street Fernley, NV 89408	State of Nevada	<input type="checkbox"/> Personal service <input checked="" type="checkbox"/> Email service <input type="checkbox"/> Fax service <input type="checkbox"/> Mail service
ERIC DEAN WERRE #1233467 SOUTHERN DESERT CORRECTIONAL CENTER P.O. BOX 208 INDIAN SPRINGS, NEVADA 89070		<input type="checkbox"/> Personal service <input type="checkbox"/> Email service <input type="checkbox"/> Fax service <input checked="" type="checkbox"/> Mail service

1 **PWHC**
2 **MICHAEL LASHER, ESQ.**
3 Nevada Bar No. 13805
4 Law Office of Michael Lasher, LLC.
5 827 Kenny Way
6 Las Vegas, NV 89107
7 Phone: (510) 507-2869
8 Michaellasher2@gmail.com
9 Attorney for Petitioner

10
11 **DISTRICT COURT**
12
13 **LYON COUNTY, NEVADA**

14 ERIC DEAN WERRE)

15)
16 Petitioner,)

17 v.)

CASE NO: 20-CR-00234
HON. LEON ABERASTURI

18)
19 WILLIAM HUTCHINGS, WARDEN,)
20 Southern Desert Correctional Center;)
21 STATE OF NEVADA)
22 Respondents.)
23)
24)
25)
26)
27)
28)

29 **PETITION FOR WRIT OF HABEAS CORPUS**
30 **(POST-CONVICTION)**

31 1. **Name of institution and county in which you are presently imprisoned or where and**
32 **how you are presently restrained of your liberty:**

33 Southern Desert Correctional Center

34 2. **Name and location of court which entered the judgment of conviction under attack:**

35 Third Judicial District Court, Clark County Nevada.

36 3. **Date of judgment of conviction:**

37 April 28, 2020

38 4. **Case number:** 20-CR-00234

1
2 **5. (a) Length of sentence:**

3 Petitioner was sentenced as follows:

4
5 **COUNT 1** to a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a
MINIMUM parole eligibility of SEVENTY-TWO (72) MONTHS;

6 **COUNT 2** to a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a
MINIMUM parole eligibility of SEVENTY-TWO (72) MONTHS, CONSECUTIVE to
7 COUNT 1;

8 **COUNT 3** to a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a
MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS, CONCURRENT to
9 COUNTS 1 AND 2;

10 **COUNT 4** to a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a
MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS, CONCURRENT to
11 COUNTS 1 AND 2

12 **AGGREGATE TOTAL of THREE HUNDRED AND SIXTY (360) MONTHS**
13 **MAXIMUM with a MINIMUM PAROLE ELIGIBILITY OF ONE HUNDRED**
FOURTY-FOUR (144) MONTHS.

14 ONE HUNDRED NINE (109) DAYS credit for time served.

15
16 **(b) If sentence is death, state any date upon which execution is scheduled:**

17 N/A

18 **6. Are you presently serving a sentence for a conviction other than the conviction under**
19 **attack in this motion?**

20 No

21 If "yes," list crime, case number and sentence being served at this time: N/A

22 **7. Nature of offense involved in conviction being challenged:**

23 **COUNT 1:** Trafficking in Schedule I Substances between 14 and 28 grams
(NRS 453.3385(1)(b))

24 **COUNT 2:** Principal to Burglary, Gaining Possession of Firearm (NRS 205.060,
205.060(4), 195.020)

25 **COUNT 3:** Principal to Stolen Firearm (NRS 205.275, 205.275(2)(c), 195.020)

26 **COUNT 4:** Principal to Possession of Stolen Firearm (NRS 205.275,
205.275(2)(c), 195.020)

27
28 **8. What was your plea?**

Guilty to Counts 1, 2, 3, 4.

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details:

N/A *****

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by:

- (a) Jury _____
(b) Judge without a jury _____

11. Did you testify at the trial?

N/A

12. Did you appeal from the judgment of conviction?

No.

13. If you did appeal, answer the following:

- (a) Name of court: N/A
(b) Case number or citation: N/A
(c) Result: N/A
(d) Date of result: N/A

14. If you did not appeal, explain briefly why you did not:

Because a guilty plea was entered.

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

No.

16. If your answer to No. 15 was "yes," give the following information:

- (a) (1) Name of court: N/A
(2) Nature of proceeding: N/A
(3) Grounds raised: N/A
(4) Did you receive an evidentiary hearing on your petition, application or motion? N/A
(5) Result: N/A
(6) Date of result: N/A

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: N/A

(b) As to any second petition, application or motion, give the same information:

- (1) Name of court: N/A
(2) Nature of proceeding: N/A
(3) Grounds raised: N/A
(4) Did you receive an evidentiary hearing on your petition, application or motion? N/A
(5) Result: N/A
(6) Date of result: N/A
(7) If known, citations of any written opinion or date of orders entered pursuant to such result: N/A

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach. N/A

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion? N/A

- (1) First petition, application or motion? Yes No
Citation or date of decision:
(2) Second petition, application or motion? Yes No
Citation or date of decision:
(3) Third or subsequent petitions, applications or motions? Yes No
Citation or date of decision:

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify:

- (a) Which of the grounds is the same: N/A
(b) The proceedings in which these grounds were raised: N/A

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A
19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) No. This Petition is timely filed.
20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes No ..X.....
If yes, state what court and the case number:
21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:
- Trial Counsel: Aaron Mouritsen, Esq.
- Appellate Counsel: N/A
22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack?
- No
- If yes, specify where and when it is to be served, if you know: N/A
23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.
- I. Ground One:
- Petitioner received ineffective assistance of appellate counsel in violation of his right to counsel pursuant to the Sixth Amendment to the Constitution of the United States of America and Article 1 of the Nevada Constitution due to trial counsel's incorrect advisement as to the consequences of a plea, rendering such plea to be involuntary and unknowing. See additional pages.
- II. Petitioner requests an evidentiary hearing pursuant to NRS 34.770.

1 Post-conviction counsel for Petitioner was hired less than thirty (30) days prior to the filing
2 of this Petition and no transcripts have been produced. Therefore, post-conviction counsel has not
3 been able to fully review the record or trial counsel's investigation. Additionally, post-conviction
4 counsel has not been able to conduct her own investigation. However, due to the fact that
5 Petitioner's Judgment of Conviction was entered on October 23, 2019, he must file his initial
6 Petition now so as not to be time barred pursuant to NRS 34.726. Petitioner may raise additional
7 grounds in supplemental pleadings and/or expand on the issues raised in the instant Petition after
8 post-conviction counsel has conducted a full review of the file and transcripts as well as completed
9 investigation.

10 WHEREFORE, petitioner prays that the court grant petitioner relief to which petitioner
11 may be entitled in this proceeding.

12 EXECUTED on the ** day of the month of ** of the year 2021.

13
14 /s/ Michael Lasher
15 **MICHAEL LASHER, ESQ.**
16 Nevada Bar No. 13805
17 Law Office of Michael Lasher, LLC.
18 827 Kenny Way
19 Las Vegas, NV 89107
20 Phone: (510) 507-2869
21 Michaelasher2@gmail.com
22 Attorney for Petitioner

23 VERIFICATION

24 Under penalty of perjury, the undersigned declares that the undersigned is the attorney
25 representing the petitioner named in the foregoing petition and knows the contents thereof; that the
26 pleading is true of the undersigned's own knowledge, except as to those matters stated on
27 information and belief, and as to such matters the undersigned believes them to be true.

28 Dated this 12 thday of March, 2021.

/s/ Michael Lasher
MICHAEL LASHER, ESQ.

Nevada Bar No. 13805
Law Office of Michael Lasher, LLC.
827 Kenny Way
Las Vegas, NV 89107
Phone: (510) 507-2869
Michaelasher2@gmail.com
Attorney for Petitioner

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3 **CERTIFICATE OF SERVICE**

4 **IT IS HEREBY CERTIFIED** by the undersigned that on ** day of ***, 2021, I served a true
5 and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS (POST-**
6 **CONVICTION)** on the parties listed on the attached service list via one or more of the methods
7 of service described below as indicated next to the name of the served individual or entity by a
8 checked box:

9 **VIA U.S. MAIL:** by placing a true copy thereof enclosed in a sealed envelope with postage
10 thereon fully prepaid, in the United States mail at Las Vegas, Nevada.

11 **VIA FACSIMILE:** by transmitting to a facsimile machine maintained by the attorney or the party
12 who has filed a written consent for such manner of service.

13 **BY PERSONAL SERVICE:** by personally hand-delivering or causing to be hand delivered by
14 such designated individual whose particular duties include delivery of such on behalf of the firm,
15 addressed to the individual(s) listed, signed by such individual or his/her representative accepting
16 on his/her behalf. A receipt of copy signed and dated by such an individual confirming delivery of
17 the document will be maintained with the document and is attached.

18 **BY E-MAIL:** by transmitting a copy of the document in the format to be used for attachments to
19 the electronic-mail address designated by the attorney or the party who has filed a written consent
20 for such manner of service.

21 /s/ Michael Lasher

22 **MICHAEL LASHER, ESQ.**

23 Nevada Bar No. 13805

24 Law Office of Michael Lasher, LLC.

25 827 Kenny Way

26 Las Vegas, NV 89107

27 Phone: (510) 507-2869

28 Michaellasher2@gmail.com

Attorney for Petitioner

SERVICE LIST

ATTORNEYS OF RECORD	PARTIES REPRESENTED	METHOD OF SERVICE
LYON COUNTY DISTRICT ATTORNEY'S OFFICE 555 E Main Street Fernley, NV 89408	State of Nevada	<input type="checkbox"/> Personal service <input checked="" type="checkbox"/> Email service <input type="checkbox"/> Fax service <input type="checkbox"/> Mail service
ERIC DEAN WERRE #1233467 SOUTHERN DESERT CORRECTIONAL CENTER P.O. BOX 208 INDIAN SPRINGS, NEVADA 89070		<input type="checkbox"/> Personal service <input type="checkbox"/> Email service <input type="checkbox"/> Fax service <input checked="" type="checkbox"/> Mail service

FILED

2021 MAR 22 PM 2:57

TANYA STEIFINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

KATHY THOMAS

1 Case No. 20-CR-00234

2 Dept. No. II

3
4
5
6 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF LYON

8 ERIC DEAN WERRE,

9 Petitioner,

10 vs.

11 WILLIAM HUTCHINGS, WARDEN,
12 Southern Desert Correctional Center;
13 STATE OF NEVADA,

14 Respondents.

15
16
17
18
19
20
21
22
23
24
25
26
27
28
**ANSWER TO PETITION FOR WRIT
OF HABEAS CORPUS
(Post-Conviction)**

COMES NOW, the State of Nevada, by and through Stephen B. Rye, District Attorney of Lyon County, and Matthew K. Merrill, Deputy District Attorney, and hereby submits this ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS (Post-Conviction).

This Motion is based on the attached Memorandum of Points and Authorities, all documents and pleadings on file in this case, and any evidence which may be produced at a hearing on this matter.

Pursuant to NRS 239B.030, the undersigned affirms that this document does not contain any social security numbers.

DATED this 18 day of March, 2021.

Stephen B. Rye
Lyon County District Attorney

By:


Matthew K. Merrill
Deputy District Attorney

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

I. FACTS

The Petitioner, Eric Werre, was charged by way of Amended Criminal Complaint, Exhibit A, with PRINCIPAL TO TRAFFICKING IN A CONTROLLED SUBSTANCE OVER 28 GRAMS, a violation of NRS 453.3385 AND 195.020, a CATEGORY A FELONY, PRINCIPAL TO POSSESSION OF STOLEN VEHICLE WITH A VALUE MORE THAN \$3,500.00, a violation of NRS 205.273 AND 195.020, a CATEGORY B FELONY, fourteen counts of PRINCIPAL TO POSSESSION OF STOLEN FIREARM, a violation of NRS 205.275(2)(c) and 195.020, a CATEGORY B FELONY, sixteen counts of EX FELON POSSESSION OF A FIREARM, IN VIOLATION OF NRS 202.360, a CATEGORY B FELONY, PRINCIPAL TO POSSESSION OF SHORT-BARRELED RIFLE OR SHOTGUN, in violation of NRS 202.275 AND 195.020, a CATEGORY D FELONY, POSSESSION OF A CONTROLLED SUBSTANCE, a violation of NRS 453.336, a CATEGORY E FELONY, and PRINCIPAL TO COMMIT BURGLARY, a violation of NRS 205.060(4) AND 195.020, a CATEGORY B FELONY for crimes having been committed on or about the 2nd day of January, 2020. The Petitioner signed an Unconditional Waiver of Preliminary Hearing in the Walker River Justice Court on the 20th day of February, 2020. (Exhibit B).

On the 25th day of February, 2020, an Information was filed in the Third Judicial District Court charging the Petitioner with TRAFFICKING IN A CONTROLLED SUBSTANCE OVER 14 GRAMS, BUT LESS THAN 28 GRAMS a violation of NRS 453.3385(1)(b), a CATEGORY B FELONY, PRINCIPAL TO COMMIT BURGLARY, a violation of NRS 205.060(4) AND 195.020, a CATEGORY B FELONY, PRINCIPAL TO POSSESSION OF STOLEN FIREARM, a violation of NRS 205.275(2)(c) and 195.020, a CATEGORY B FELONY, PRINCIPAL TO POSSESSION OF STOLEN FIREARM, a violation of NRS 205.275(2)(c) and 195.020, a CATEGORY B FELONY. (Exhibit C).

On the 2nd day of March, 2020, the Petitioner was thoroughly canvassed and plead guilty to the charges contained in the Information. On the 20th day of April, 2020, the Defendant was sentenced.

II. ARGUMENT

CLAIM I

Trial Counsel provided effective assistance of counsel because he negotiated a fair resolution, effectively argued at sentencing and advised the Petitioner of his defenses and constitutional rights as addressed in the Court's canvas.

Nevada courts evaluate a "claim of ineffective assistance of trial counsel under the 'reasonably effective assistance' test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). "Under the Strickland test, two elements must be established by a defendant claiming ineffective assistance of counsel: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense." *Kirksey* 122 Nev. at 987 citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; see also *Dawson v. State*, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). A court need not consider both prongs of the Strickland test "if the defendant makes an insufficient showing on either one". *Kirksey* 122 Nev. at 987 citing *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069. "A court may consider the two test elements in any order". *Kirksey* 122 Nev. at 987 citing *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.

"'Deficient' assistance of counsel is representation that falls below an objective standard of reasonableness. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Kirksey v. State*, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996), citing *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; accord *Dawson*, 108 Nev. at 115, 825 P.2d at 595.

"In meeting the "prejudice" requirement, the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. When a conviction is the result of a guilty plea, [t]he second, or "prejudice," requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."

Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

1 **A. Trial Counsel effectively negotiated a very fair resolution.**

2 The Petitioner was facing thirty-five counts in the Amended Criminal Complaint. Most of
3 these were Category B Felonies with one count of Trafficking Category A, life in prison. Trial
4 Counsel negotiated a deal that would remove thirty-one counts of exposure for the Petitioner.
5 The underlying facts are egregious in that the Petitioner along with two other co-defendant's
6 broke into a warehouse full of firearms and transported those guns across state lines to be
7 sold. The damage inflicted by the Petitioner's actions is immense and will most likely be felt for
8 years as those guns were sold on the black market.

9 The Petitioner cites case CR20-2115, a Washoe County case, handled by a local
10 attorney. We know nothing about CR20-2115. CR20-2115 is not precedent. There are a
11 myriad of reasons why a case is negotiated a certain way. Any discussion about why it was
12 handled a certain way would be merely speculation and should not be entertained by the
13 Court.

14 AB 236 is not retroactive. Negotiating a plea more in line with AB 236 would not have
15 occurred. The Defendant, in-part, was still facing fourteen counts of possession of stolen
16 firearms and sixteen counts of ex-felon in possession of those firearms. AB 236 did not alter
17 or change the punishments associated with those counts, while it may have altered the
18 trafficking and burglary charge.

19 Negotiation occurred in real time with the entirety of the criminal complaint not just the
20 four that it was narrowed down to. Trial Counsel was successfully able to reduce a thirty-five
21 count case down to four counts and remove life in prison off the table. Trial Counsel was more
22 than effective.

23 **B. Trial Counsel effectively argued at sentencing.**

24 "When, as in the instant case, judges have sentencing discretion, possession of the
25 fullest information possible regarding the defendant's life and characteristics is essential to the
26 selection of an appropriate sentence." *Lockett v. Ohio*, 438 U.S. 586, 603, 98 S.Ct. 2954,
27 2964, 57 L.Ed.2d 973 (1978). "A sentencer may not refuse to consider or be precluded from
28

1 considering any relevant mitigating evidence." *Skipper v. South Carolina*, 476 U.S. 1, 4, 106
2 S.Ct. 1669, 1670, 90 L.Ed.2d 1 (1986).

3
4 Trial Counsel stated:

5 "Your Honor, in this case, we're going to be asking for a closer
6 recommendation that was laid out in the PSI. We're going to be asking for 36
7 months to 120 months in Count I as laid out in the presentence investigation
8 report.

9 36 on Count II, 36 months required 20 months to run concurrent rather
10 than consecutive to Count I.

11 In count III, 16-72 months as laid out in the PSI to run concurrent instead
12 of consecutive to counts I and II.

13 And 16 to 72 months on Count IV to run concurrent instead of
14 consecutive to Counts I, II, III, IV.

15 You Honor, in looking at this case, I think it's important to recognize the
16 goal should not be to take such action to victimize the victim again in this case.

17 As you can see from that letter, Eric has the opportunity when he's
18 released at whatever point that is to get employment and start paying this
19 restitution. Instead, it will likely fall on mostly Eric to make that responsibility and
20 pay back that restitution.

21 And until Eric is out and until Eric is actually working on that as far as the
22 job opportunity to—as well as to have the skills to be able to do, it's likely the
23 victim will continue to not have that money.

24 You Honor, the District Attorney is asking for more than ten years in this
25 case. It means it will be ten years until the victim's things are returns all from that
26 restitution.

27 Instead, Your Honor, by giving him a smaller amount, it gives the
28 opportunity to work and pay that restitution.

The second point I would make, Your Honor, is that looking forward as
the district Attorney is asking us to do, it's important to know that Eric has a good
support network.

Both his father Rick, as well as fiancé, Ann Marie, who have been in good
contact with me, they're both involved in this case and care deeply about what
happens to Eric and the opportunities that he has in the future.

He has a strong support network in California, especially to be able to get
him working and keep him out of trouble once he's released and it should be
looked at as a reason to reduce it.

Finally, Your Honor, as to the point number three, the reason that these
should be run concurrent is because these all parts of the same common
scheme or plan.

Your Honor, Count II specifically applies to burglary or the inference in
order to steal the firearms.

When the burglary occurred, it was to steal the firearms as laid out in
Count III and IV being part of the same act as laid out in Counts II.

And all that comes together to provide the cash to the Defendant, the
Defendant for the controlled substances that become the basis for count I.

1 This—these controlled substance were used to a great extent to be for
2 Eric as well as the two co-Defendants' drug addiction that Eric has never really
3 had the opportunity to be able to handle.

4 He intends, once he enters prison, to be able to take responsibility and to
5 do the referred treatment programs in order to reduce his time there, but also to
6 do drug programs upon his release.

7 Because all four of these cots are all part of the same incident, the same
8 plan, I think justice would demand that they run together and be run concurrently
9 rather than consecutively, because they are not separate incidences that
10 occurred, but a single incident. And they also arise out of a single event
11 happening.

12 Your Honor, Eric is the most likely of the three co-Defendant's to get out
13 and be able to make something of his life, and I think that should be factors in to
14 give hi the opportunity to pay back the restitution. Thank you." (Sentencing
15 Transcript pgs. 20-23, Exhibit D).

16 Trial Counsel understood that AB 236 was not current law at the time and would not be
17 retroactively applied to the current case. Trial Counsel argued within the lower side of the
18 sentencing provided by the appropriate NRS and requested concurrent sentencing. Trial
19 Counsel specifically spoke about how the Petitioner came from a strong supportive network
20 and would do much better once he was released than his co-Defendants. Trial Counsel
21 specifically pointed out that the Petitioner's father was present in the courtroom. Apparently,
22 Petitioner's father could have made a statement to the court had he wanted to.

23 The evidence against the Petitioner and his co-Defendants was robust. Co-Defendant
24 Kennedy, in part, received life in prison with the possibility of parole after 10 years for his part
25 in the crimes. All three co-defendants were involved in, burglarized the building, transporting
26 the guns to California to be sold, possession stolen firearms, and possessing trafficking
27 amounts of methamphetamine. Werre's possession methamphetamine for personal use in his
28 pocket doesn't negate his possession of trafficking amounts.

C. Trial counsel adequately advised the Petitioner of his Defenses

NRS 175.291 provides:

1. A conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the

1 commission of the offense; and the corroboration shall not be sufficient if it
2 merely shows the commission of the offense or the circumstances thereof.

3 2. An accomplice is hereby defined as one who is liable to
4 prosecution, for the identical offense charged against the defendant on trial in
5 the cause in which the testimony of the accomplice is given.

6 In *Evans v. State*, 113 Nev. 885, 891–92, 944 P.2d 253, 257 (1997), the Nevada
7 Supreme Court stated:

8 “Corroborative evidence ‘need not in itself be sufficient to establish guilt’—‘it will satisfy
9 the statute if it merely tends to connect the accused to the offense.’ *Heglemeier v. State*, 111
10 Nev. 1244, 1250, 903 P.2d 799, 803 (1995) (citing *Cheatham v. State*, 104 Nev. 500, 504–05,
11 761 P.2d 419, 422 (1988)). Corroborating evidence, however, must independently connect the
12 defendant with the offense; evidence does not suffice as corroborative if it merely supports the
13 accomplice's testimony. If there is no independent, inculpatory evidence—evidence tending to
14 connect the defendant with the offense, “there is no corroboration, though the accomplice may
15 be corroborated in regard to any number of facts sworn to him.” *Id.* (quoting *Austin v. State*, 87
16 Nev. 578, 585, 491 P.2d 724, 728–29 (1971)). In addition, “where the connecting evidence
17 ‘shows no more than an opportunity to commit a crime, simply proves suspicion, or is equally
18 consonant with the reasonable explanation pointing toward innocent conduct on the part of the
19 defendant, the evidence is to be deemed insufficient.’ ” *Id.* at 1250–51, 903 P.2d 799 (quoting
20 *State v. Dannels*, 226 Mont. 80, 734 P.2d 188, 194 (1987) (quoting *State v. Mitchell*, 192
21 Mont. 16, 625 P.2d 1155, 1158 (1980))).

22 The Petitioner was fully canvassed by this Court at the arraignment. The Petitioner
23 confirmed that he had spoken to his attorney, understood his rights, understood his legal
24 defenses, penalties associated with the crimes, and the allegations surrounding the crimes.
25 The Defendant plead guilty to each offense in the Information. (See Exhibit E).

26 D. Petitioner's Request for his Guilty Plea to be set aside should be denied.

27 NRS 176.165, states:
28

1 "Except as otherwise provided in this section, a motion to withdraw a plea of guilty,
2 guilty but mentally ill or nolo contendere may be made only before sentence is imposed or
3 imposition of sentence is suspended. To correct manifest injustice, the court after sentence
4 may set aside the judgment of conviction and permit the defendant to withdraw the plea."

5 In *Baal v. State*, 106 Nev. 69, 72, 787 P.2d 391, 394 (1990), the Nevada Supreme
6 Court states:

7 "A guilty plea is presumptively valid and the burden is upon appellant to show that the
8 denial of a motion to withdraw the plea constituted a clear abuse of discretion. *Wynn v. State*,
9 96 Nev. 673, 675, 615 P.2d 946, 947 (1980). Following sentencing, a guilty plea may be set
10 aside only to correct a manifest injustice. NRS 176.165. A guilty plea will be considered
11 properly accepted if the trial court sufficiently canvassed the defendant to determine whether
12 the defendant knowingly and intelligently entered into the plea. *Williams v. State*, 103 Nev.
13 227, 230, 737 P.2d 508, 510 (1987) (citing *Bryant v. State*, 102 Nev. 268, 721 P.2d 364
14 (1986))."

15 Failure to advise a defendant whether a crime permits probation prior to entry of plea.
16 (See *Little v. Warden*, 117 Nev. 845, 850, 34 P.3d 540, 543 (2001))

17 Here, the Court made a previous finding that the Defendant's plea was freely,
18 voluntarily, and intelligently. (Exhibit , pg 20, ln 5-9). This was not a manifest injustice. The
19 Petitioner freely, voluntarily, and intelligently entered pleas of guilty after speaking with his
20 attorney, being advised of his rights, defenses, sentencing ranges, among other.

21 22 CLAIM II

23 Petitioner's sentence was not cruel and unusual punishment because the Petitioner
24 was sentenced within the range permitted by the legislature and AB 236 did not retroactively
25 alter sentences.

26
27 A. AB 236 is not retroactive.
28

1 In *State v. Second Judicial Dist. Court ex rel. County of Washoe*, 124 Nev. 564, 567,
2 188 P.3d 1079, 1081 (2008), the defendant plead guilty in district court. Sentencing was set
3 for September 28, 2007. Prior to sentencing, the Nevada Legislature enacted AB 510 and
4 altered the deadly weapon enhancement scheme. The district court altered its sentence
5 based on the newly enacted AB 510. The legislature listed the effective date as July 1, 2007
6 and did not include any indication that it should apply retroactively. The State then filed a writ
7 of mandamus.

8 The Nevada Supreme Court specifically addressed the issue of retroactivity. The
9 Nevada Supreme Court held, "that unless the Legislature clearly expresses its intent to apply
10 a law retroactively, Nevada law requires the application of the law in effect at the time of the
11 commission of a crime." *State v. Second Judicial Dist. Court ex rel. County of Washoe*, 124
12 Nev. 564, 567, 188 P.3d 1079, 1081 (2008). The Nevada Supreme Court provided that the
13 penalty that a defendant should be sentenced under is the one at the time of the commission
14 of the crime and not the penalty at the time of sentencing. See *State v. Second Judicial Dist.*
15 *Court ex rel. County of Washoe*, 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008).

16 On the 8th day of March, 2019, the Committee on the Judiciary held a meeting to
17 discuss Assembly Bill 236. During that meeting this exchange occurred:

18 **Assemblywoman Peters:** "My question is, we talk about sentencing reform, but is
19 that meant to apply retroactively on some of these cases?"

20 **Assemblyman Yeager:** "Generally speaking, it would not be retroactive. The effective
21 date of the bill, whenever it is effective, means that it would apply to any sentencing that
22 happened after that date. We would not be going back and looking at prior sentences.
23 Although, from a fairness perspective, we may want to do that as a Legislature. It becomes
24 extraordinarily difficult to do, particularly in the context of making sure victims had their day
25 and had their say, to go back and undo some of that. It would just apply going forward."

26 (See Exhibit F, pg. 20).

27 **Holly Welborn, Policy Director, American Civil Liberties Union of Nevada:**
28

1 "Assembly Bill 236 makes important changes to our system, changes that we should be
2 very proud of if this bill passes, but the bill does have its shortcomings. The first
3 shortcoming we see is the fact that it does not apply retroactively. This means there are
4 thousands of Nevadans who are serving time in the Nevada Department of Corrections
5 on grossly disproportionate sentences. If this bill applied retroactively, we could correct
6 that and address the prison population more immediately."

7 (See Exhibit F, pg. 27).

8 A search of all the minutes concerning AB 236 is void of any mention of serious
9 comment or serious contemplation of AB 236 retroactively. In fact, the opposite is quite true.
10 The brief comments above were the sole comments regarding retroactively and appears to
11 have not even been seriously contemplated. Retroactivity is not part of AB 236.

12 Throughout the Petition, there is a sense that somehow the Petitioner was wronged by
13 committing the crimes 6 months before July 1, 2020. The fact remains that the crimes were
14 committed before AB 236 was effective. The legislature clearly expressed an intent that AB
15 236 not be retroactive.

16 It is irrational that a defendant could commit a crime plead guilty and simply push out
17 sentencing for any length of time to take advantage of a new statutory scheme unless
18 specifically provided for. Here, the Petitioner not only committed the crimes prior to AB 236
19 becoming effective but was even sentenced prior to new changes.

20
21 B. The Petitioner was sentenced within the constitutional limits provided by the
22 legislature and therefore there is a presumption that the Petitioner's sentence is not cruel and
23 unusual.

24 In *Schmidt v. State*, 94 Nev. 665, 668, 584 P.2d 695, 697 (1978), the Nevada Supreme
25 Court stated:

26 "It is worthy to note in this regard that the legislature, within constitutional limits, is
27 empowered to define crimes and determine punishments, and the courts are not to encroach
28 upon that domain lightly. *Egan v. Sheriff*, 88 Nev. 611, 503 P.2d 16 (1972). Further, there is a

1 general presumption favoring the validity of statutes which dictates a recognition of their
2 constitutionality unless a violation of constitutional principles is clearly apparent. *State ex rel.*
3 *Tidvall v. District Court*, 91 Nev. 520, 539 P.2d 456 (1975); *Cummings v. City of Las Vegas*,
4 88 Nev. 479, 499 P.2d 650 (1972); *City of Las Vegas v. Ackerman*, 85 Nev. 493, 457 P.2d
5 525 (1969). Thus, it is frequently stated that a sentence of imprisonment which is within the
6 limits of a valid statute, regardless of its severity, is normally not considered cruel and unusual
7 punishment in the constitutional sense. *United States v. Johnson*, 507 F.2d 826 (7th Cir.
8 1974), Cert. den. 421 U.S. 949, 95 S.Ct. 1682, 44 L.Ed.2d 103 (1975); *People v. Dudley*, 46
9 Ill.2d 305, 263 N.E.2d 1 (1970), Cert. den. 402 U.S. 910, 91 S.Ct. 1386, 28 L.Ed.2d 651
10 (1971). Accord, *Anderson v. State*, 92 Nev. 21, 544 P.2d 1200 (1976).

11 The Petitioner was sentenced within the statutory scheme provided by the Nevada
12 legislature. This case is egregious. The penalty is appropriate as it reflects the seriousness of
13 the crimes. The Petitioner burglarized a building stealing over 100 firearms and sold those
14 firearms for cash in California. The sentence is not cruel and unusual.

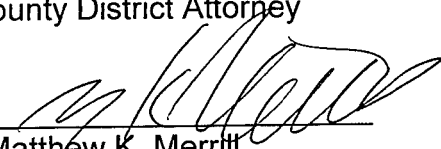
15
16 **III. CONCLUSION**

17 Therefore, the State requests this Honorable Court to Deny the Petition without a
18 hearing.

19 DATED this 18 day of March, 2021.

20
21 Stephen B. Rye
Lyon County District Attorney

22
23 By:


24 Matthew K. Merrill
25 Deputy District Attorney
26
27
28

CERTIFICATE OF SERVICE

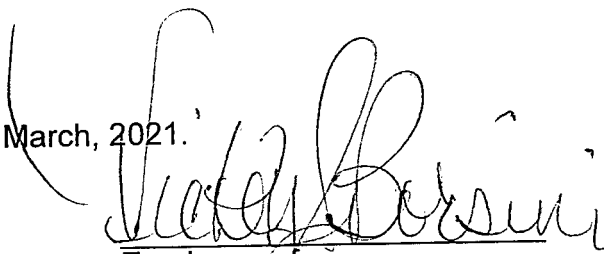
I certify that I am an employee of the Lyon County District Attorney's Office, and that on the date below I served a true and correct copy of the **ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS (Post-Conviction)**, by the following:

- ☒ **MAIL:** By placing an original or true copy in a sealed envelope, postage fully prepaid, in a U.S. Postal Service mailbox addressed to the individual(s) and/or address(es) listed below
- ☐ **CERTIFIED MAIL:** By placing an original or true copy in a sealed envelope, postage fully prepaid, by certified mail with tracking numbers _____ in a U.S. Postal Service mailbox addressed to the individual(s) and/or address(es) listed below
- ☐ **PERSONAL DELIVERY:** By hand delivering an original or true copy to the individual(s) and/or address(es) listed below
- ☐ **E-FILE:** By electronically filing the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the individual(s) listed below
- ☐ **FACSIMILE:** By faxing an original or true copy to the individual(s) and/or address(es) and fax number(s) listed below
- ☐ **FEDERAL EXPRESS/UPS OR OTHER OVERNIGHT DELIVERY:** By placing an original or true copy in a sealed envelope, postage fully prepaid, with an overnight delivery carrier, addressed to the individual(s) and/or address(es) listed below (Tracking Number: _____)
- ☐ **EMAIL:** By attaching a true copy attached to an email addressed to the individual(s) and/or email address(es) listed below

Addressed as follows:

Michael Lasher Esq.
827 Kenny Way
Las Vegas, NV 89107

DATED this 22nd day of March, 2021.


Employee of
Lyon County District Attorney's Office

MICHAEL LASHER, ESQ.
Nevada Bar No. 13805
Law Office of Michael Lasher, LLC.
827 Kenny Way
Las Vegas, NV 89107
Phone: (510) 507-2869
Michaelasher2@gmail.com
Attorney for Petitioner

DISTRICT COURT
LYON COUNTY, NEVADA

ERIC DEAN WERRE)	
)	
Petitioner,)	
)	Case No: 20-CR-00234
v.)	Hon. Leon Aberasturi
)	
WILLIAM HUTCHINGS, WARDEN,)	Dept. II
Southern Desert Correctional Center;)	
STATE OF NEVADA)	
Respondents.)	
_____)	

REPLY TO STATE'S ANSWER TO PETITION
FOR WRIT OF HABEAS CORPUS

The State's Answer either misapprehends Werre's claims or fails to meaningfully address them, instead repeatedly relying on non sequiturs.

CLAIM I

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE UNDER THE SIXTH AMENDMENT BY FAILING TO PROPERLY ADVISE WERRE OF HIS DEFENSES, FAILING TO PROPERLY NEGOTIATE A PLEA, AND FAILING TO ADEQUATELY ARGUE AT SENTENCING

Failing to adequately negotiate a plea bargain

Regarding Claim 1 that trial counsel rendered ineffective assistance concerning negotiation of the plea bargain, the State dismisses the citation to a Washoe County plea in Case No. CR20-2115 as “not precedent” and as speculative because of the fact-based nature of individual plea negotiations. State’s Answer at page 4. Werre acknowledges that every case is different. Yet he cited the Washoe case to demonstrate his counsel’s breach of Prong 1 of *Strickland*, the standard of care requirement that defense attorneys act with reasonable competence. The Washoe County attorney negotiated a plea in light of the impending extensive changes in crimes and penalties and Werre’s counsel should have done the same. *Brown v. State*, 110 Nev 846, 849 (1994) held that “a properly zealous advocate must do all he can to defend is client.”

The State repeatedly and with great emphasis argues that AB 236 is not retroactive. Answer at pages 4, 8 to 10. The State argues, "AB 236 is not retroactive. Negotiating a plea more in line with AB 236 would not have occurred." Answer at page 4. Yet this is not Werre's point; nor do any of his arguments depend on the act's retroactivity. Werre's point is that his attorney should have argued that as a matter of equity, the plea and sentence should have been more in line with the bill's ameliorative changes and thus in line with the PSI's recommendations.

Failure to adequately argue at sentencing

Trial counsel rendered ineffective assistance in failing to marshal strong arguments for the sentence recommended in the PSI. The PSI recommended 36 to 120 months for both Counts I and II, without specifying whether they should run concurrent or consecutive. The PSI also recommended 16 to 72 months for both Counts III and IV and that "the State will recommend that two counts of Possession of a Stolen Firearm be run concurrent to each other." PA 39. Yet in the end, Werre's aggregate total sentence was one-hundred-forty-four months (12 years) to three-hundred-sixty months (30 years). PA 73 et seq.

The State argues that, "Trial Counsel understood that AB 236 was not current law at the time and would not be retroactively applied to the current case." Again, the State misses the point. Trial counsel did not even mention, let alone argue, that as a matter of equity and because of the impending ameliorative changes in Nevada law, Werre should be sentenced in line with the PSI recommendation. As a result of counsel's failure to even mention AB 236, Werre's minimum parole eligibility on Count 1 alone was three years beyond that recommended in the PSI. Trial counsel should have at least informed the court that after July 1, 2020, a mere six months after the events forming the basis of the allegations, Werre could not have even been charged with trafficking, as alleged in Count 1. He would have only been facing mere possession, with 14 to 28 grams amounting to a Category C felony carrying an exposure of one to five years with the possibility of probation and not mandatory prison.

Finally, the State does not address Werre's argument that at sentencing counsel did not argue that while Atkins, clearly the mastermind of the crimes, was never even sent to prison, Werre's minimum parole eligibility is still eleven years in the future. Nor does

the State address that defense counsel also failed to argue that Werre's culpability was minimal compared to that of Atkins. There was no DNA or other physical evidence tying Werre to the burglary of the gun storage facility. There was no evidence, such as Werre's possession of keys, indicating that he had access to the master bedroom in Atkins' residence at 2920 West Fir Street, where the majority of the firearms and methamphetamine was located and which was locked to prevent Atkins' kids from having access. Furthermore, when Werre was arrested he had only a 2.5 gross gram baggie of methamphetamine on his person, which is an amount consistent with personal use. PA 36.

In contrast, there was substantial evidence of Atkins' culpability, which gave her a motive to lie to the police in hopes of a lesser sentence. For instance, Atkins lived very close to gun storage facility, where her DNA was found, and her home was the repository for all of the stolen weapons and the methamphetamine. As well, police recovered a sheet of paper in Atkins' handwriting indicating the stolen guns which she had already sold and at which price. Plus, she had thousands of dollars of cash and numerous firearms on her person when arrested. PA 35 – 38. As such, there was little evidence of Werre's criminality and significant

evidence of Atkins' culpability, which should have been argued by defense counsel at Werre's sentencing for a sentence in line with the PSI.

Failing to Adequately Advise of Defenses

Trial counsel also failed to advise Werre of his possible defenses and strengths of his case, such that his decision to plead guilty was not made knowingly, voluntarily, and intelligently. In this case, trial counsel failed to advise Werre that Atkins' statements must be corroborated before they were used against him and that there was little or no evidence of corroboration in this case. NRS 175.291(1).

The State's response is a non sequitur. "The Petitioner was fully canvassed by this Court at the arraignment. The Petitioner confirmed that he had spoken to his attorney, understood his rights, understood his legal defenses, penalties associated with the crimes, and the allegations surrounding the crimes." Answer at page 7. Yet the fact remains that trial counsel did not inform Werre of the requirement in NRS 175.291(1). During the plea colloquy, Werre answered as he did because he did not know what he did not know: that Atkins' statement

required corroboration before it could be used against him at trial. Had Werre known this, he would not have plead guilty.

Similarly, in arguing that there was not a manifest injustice that suffices for Werre to withdraw his guilty plea pursuant to NRS 176.165, the State posits a similar non sequitur: "Here, the Court made a previous finding that the Defendant's plea was freely, voluntary, and intelligently (sic). (Exhibit, pg. 20, ln 5-9)." Answer at page 8. Again, Werre did not know what he did not know at sentencing because his counsel never informed him of the requirements of NRS 175.291(1). In the instant case, it is a manifest injustice that Werre was sentenced to 12 to 30 years while the mastermind never spent one day in state prison. It is a manifest injustice that had the crimes been a mere six months later, Werre's maximum sentence would have been a fraction of what he now faces. Werre was sentenced to 12 to 30 years. Yet six months later, he would have faced only three to ten years: Count I's exposure is currently one to five years and Count II's exposure is one to four years; if run consecutively, this amounts two to nine years. Counts III and IV's exposure remains three to ten years, which the District

Court ran concurrent to Counts I and II. His convictions must be set aside.

CLAIM II

WERRE'S THIRTY YEAR SENTENCE VIOLATES THE EIGHTH AMENDMENT IN LIGHT OF THE OVERHAUL OF NEVADA'S CRIMINAL CODES

In light of the far-reaching ameliorative changes to crime and punishment wrought by AB 236, Werre's punishment violates the Eighth Amendment's requirement that a punishment be in line with society's evolving standards of decency. Werre was arrested a mere six months before July 1, 2020, at which date he could not have been charged with trafficking, as alleged in Count 1. He would have only been facing mere possession, with 14 to 28 grams amounting to a Category C felony carrying an exposure of one to five years with the possibility of probation and not mandatory prison. Yet Werre was sentenced to 6 to 15 years on Count I. As such, his minimum sentence is even more than the maximum under the current schema.

Again, the State misses the point, arguing that "Petitioner was sentenced within the range permitted by the legislature and AB 236 did not retroactively alter sentences." Answer at page 8. Werre's point is

that the Eighth Amendment ban on cruel and unusual punishment “flows from the basic ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense. [Citation.]”

Roper v. Simmons, 543 U.S. 551, 560 (2005). In prohibiting the death penalty for the intellectually disabled, the Court stated, “[T]he standard of extreme cruelty . . . itself remains the same, but its applicability must change as the basic mores of society change.” *Atkins v. Virginia*, 536 U.S. 304, 311, fn.7 (2002), citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion.) “[E]volving standards of decency,” in turn, are measured by reference to whether a “national consensus” supports a categorical prohibition on a given punishment. *Atkins*, *supra*, 536 U.S. at pp. 312-314. To ascertain whether or not such a consensus exists, the Court considers “objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to executions.” *Roper*, *supra*, 543 U.S. at p. 563. Nevada saw fit to overhaul crime and punishment, effective a mere six months after Werre’s arrest. This indicates objective indicia of Nevada’s evolving standards of decency, as expressed in its own legislative enactments.

As such, the State's reliance on *State v. Second Judicial Dist. Court ex rel. County of Washoe*, 124 Nev. 564, 567 (2008) is misplaced. Answer at page 9. This is because Werre concedes that AB 236 is not retroactive by the terms of the statute. Yet Werre's point is that under the Eighth Amendment, Werre's sentence is unconstitutional in light of AB 236's extensive ameliorative changes in Nevada's criminal law. In fact, the State's extensive quotation of the legislative debate proves Werre's point. "**Assemblyman Yeager**: We would not be going back and looking at prior sentences. Although, *from a fairness perspective*, we may want to do that as a Legislature (emphasis added)." Answer at page 9.

Similarly, the State's argument that Werre was sentenced within the constitutional limits provided by the legislature, and the cases cited therefore (Answer at pages 10 to 11), misses the mark. This is because the United States Supreme Court, whose jurisprudence trumps that of Nevada Courts, has held that the Eighth Amendment looks to evolving standards of decency to measure whether a sentence is cruel and unusual. *Atkins, supra*, 536 U.S. at pp. 312-314. Here, because Nevada

saw fit to overhaul crime and punishment, Werre's sentence violates the Eighth Amendment.

By: 

MICHAEL LASHER, ESQ.

Nevada Bar No. 13805

Michael Lasher LLC

827 Kenny Way

Las Vegas, Nevada 89107

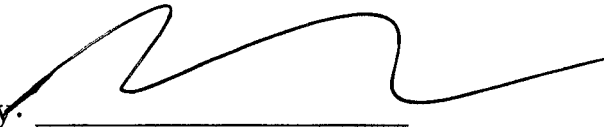
(510) 507-2869

Attorney for Petitioner

Verification

Under penalty of perjury, the undersigned declares that he is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge except as to those matters stated on information and belief and as to such matters he believes them to be true. Petitioner personally authorized undersigned counsel to commence this action.

Dated March 30, 2021.

By. 
MICHAEL LASHER, ESQ.
Nevada Bar No. 13805
Michael Lasher LLC
827 Kenny Way
Las Vegas, Nevada 89107
(510) 507-2869
Attorney for Petitioner

PROOF OF SERVICE

IT IS HEREBY CERTIFIED by the undersigned that on the 30th day of March, 2021, I served a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** on the parties listed below via one or more of the methods of service described below

VIA U.S. MAIL


Eric Werre, 1233467
Southern Desert Corr. Center
P.O. Box 208
Indian Springs, NV 89070

Second Judicial District Court
911 Harvey Way #4
Yerrington, NV 89447

Lyon County District Attorney
31 South Main Street
Yerrington, NV 89447

I certify under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on March 30, 2021 at Las Vegas, Nevada

By: 
MICHAEL LASHER, ESQ.
Nevada Bar No. 13805
Michael Lasher LLC
827 Kenny Way
Las Vegas, Nevada 89107
(510) 507-2869
Attorney for Petitioner

CASE NO. 20CR7

FILED

2020 FEB 20 PM 2:27

WALKER RIVER
JUSTICE COURT

IN THE JUSTICE COURT OF THE WALKER RIVER TOWNSHIP,
COUNTY OF LYON, STATE OF NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

UNCONDITIONAL WAIVER
OF PRELIMINARY HEARING

Eric Dean Werre
Defendant./

I, Eric Dean Werre, the above-named Defendant, in the above entitled action, having been fully advised of my right to a preliminary examination before this Court, hereby unconditionally waive my right to a preliminary examination upon the charge(s) filed against me in the criminal complaint filed in this matter. I understand and consent that my case shall be transferred to the Third Judicial District Court of the State of Nevada, in and for the County of Lyon, to answer to the charge(s) on the 20th day of March, 2020.

I further understand that this waiver is not conditioned upon any plea agreement that I may have reached with the State of Nevada. I fully understand that in the event I decide not to enter into such agreement at the District Court, I will not be entitled to a preliminary hearing on any charge(s) filed against me upon this Criminal Complaint.

DATED this 20 day of FEB, 2020.

[Signature]
DEFENDANT

Attest:

This is to certify that the foregoing Unconditional Waiver of Preliminary Examination was knowingly and voluntarily signed by the above-named Defendant, in my presence, on the 20 day of Feb, 2020.

[Signature]
Witness/Attorney

Case No. 20-CR-00234

Department No. II

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF LYON, STATE OF NEVADA

BEFORE THE HONORABLE LEON ABERASTURI

DISTRICT JUDGE, PRESIDING

THE STATE OF NEVADA,

Plaintiff,

vs.

ERIC DEAN WERRE,

Defendant.

TRANSCRIPT OF PROCEEDINGS

ARRAIGNMENT

MONDAY, MARCH 2, 2020

YERINGTON, NEVADA

Reported by:

Christy Joyce
Nevada CCR #625

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

APPEARANCES:

For the State:

Matthew Merrill
Deputy District Attorney
Yerington, Nevada

For the Defendant:

Aaron Mouritsen
Public Defender
Yerington, Nevada

1 **YERINGTON, NEVADA, MONDAY, MARCH 2, 2020, A.M. SESSION**

2 -oOo-

3 THE COURT: The next matter I have State versus
4 Werre, W-e-r-r-e.

5 MR. MOURITSEN: If I may approach, your Honor.

6 THE COURT: Sir, are you Eric Dean and is it
7 Werre? How do you pronounce the last name?

8 THE DEFENDANT: Werre.

9 THE COURT: And, sir, take a look at line 12 of
10 the information filed on February 25, 2020. Is that your
11 true legal name and is it spelled correctly?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Approximately how many times have you
14 discussed this matter with your attorney?

15 THE DEFENDANT: Half a dozen.

16 THE COURT: All right. And have you discussed
17 the crimes set forth against you?

18 THE DEFENDANT: Yeah.

19 THE COURT: Have you discussed the penalties
20 associated with those crimes?

21 THE DEFENDANT: Yes.

22 THE COURT: Have you discussed the facts and
23 circumstances surrounding the allegations?

24 THE DEFENDANT: Yes.

1 THE COURT: And have you discussed your legal
2 defenses?

3 THE DEFENDANT: Yes.

4 THE COURT: All right. The file indicates that
5 there was a waiver of preliminary hearing at the Walker River
6 Justice Court back on February 20, 2020. Do you recall
7 signing a waiver of your preliminary hearing?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Prior to signing that document did
10 you read it?

11 THE DEFENDANT: Yes.

12 THE COURT: And did you understand what you were
13 signing?

14 THE DEFENDANT: Yeah.

15 THE COURT: Did you understand that you had a
16 right to a preliminary hearing in which the State would have
17 to show the crime was committed and that you probably
18 committed it?

19 THE DEFENDANT: Yes.

20 THE COURT: Did anyone threaten you to have you
21 waive your right to a preliminary hearing?

22 THE DEFENDANT: No.

23 THE COURT: All right. Mr. Mouritsen, would your
24 client waive formal reading of the information?

1 MR. MOURITSEN: Yes, your Honor.

2 THE COURT: All right. So I'm going to briefly
3 go over the information. I want to make certain you
4 understand the crimes alleged as well as the penalties.
5 While I'm doing so, if you have any questions, interrupt and
6 ask me.

7 THE DEFENDANT: Okay.

8 THE COURT: Count 1 they're alleging trafficking
9 in a controlled substance, 14 to 28 grams, Category B felony,
10 violation of NRS 453.3385. They're alleging on or about the
11 2nd day of January, 2020, in Lyon County, State of Nevada,
12 you did wilfully, unlawfully, and knowingly possess 14 grams
13 or more but less than 28 grams of a schedule one controlled
14 substance, methamphetamine. And this occurred at or near
15 2920 West First Street in Silver Springs, Nevada. As a
16 Category B felony, it means the Court could sentence you
17 minimum of two to a maximum of 15 years in the Nevada State
18 Prison and levy a fine up to a hundred thousand dollars. The
19 crime is also non-probatable.

20 Count 2 they're alleging principal to burglary,
21 possession of a firearm or deadly weapon, in violation of NRS
22 205.060, 205.004, and 195.020. Alleging on or about the 1st
23 day of December, 2019 and the 2nd day of January 2020, in
24 Lyon County, State of Nevada, you entered a structure owned

1 by Jean Kelly or another and stole firearms or other
2 property. And that occurred at or near 2585 Ramsey-Weeks
3 Cutoff, Silver Springs. As a Category B felony, the Court
4 could sentence you to a minimum of two to a maximum of 15
5 years in Nevada State Prison and levy a fine of up to
6 \$10,000.

7 Count 3, they're alleging principal to possession
8 of stolen firearm, a Category B felony, a violation of NRS
9 205.275(2)c, 195.020. Alleging on or about the 2nd day of
10 January, 2020, Lyon County, State of Nevada, you possessed or
11 withheld the stolen Springfield XD 40 serial number MG124317,
12 a firearm, and you did so with the intent for your own gain
13 or to prevent the owner from again possessing the property.
14 And you knew that it was stolen or you did so under such
15 conditions that would have caused a reasonable person to know
16 that it was a firearm -- a stolen firearm, or you did aid and
17 abet in the commission of the offense directly or indirectly,
18 with the offense.

19 As a Category B felony, the Court could sentence
20 you to a minimum of one to a maximum of ten years in the
21 Nevada State Prison and levy a fine up to \$10,000.

22 Count 4, they're alleging you violated the same
23 statutes, same date, and they're alleging you also possessed
24 or withheld a stolen H&K 40, serial number 2020091104

1 firearm, and this occurred at or near 2920 West First Street,
2 Silver Springs, Nevada.

3 And, again, that's also a minimum of one, maximum
4 of ten years, in the Nevada State Prison and a possible fine
5 up to \$10,000.

6 Since they've charged you with multiple counts,
7 you can do concurrent time or consecutive time. Consecutive
8 time means you would have to serve the penalty on one before
9 you could start receiving credit for time served on the
10 other.

11 Do you have any questions about the crimes
12 alleged?

13 THE DEFENDANT: No, sir.

14 THE COURT: Do you have any questions about the
15 penalties?

16 THE DEFENDANT: No, sir.

17 THE COURT: All right. Please stand up. As to
18 Count 1, trafficking in a controlled substance, do you plead
19 guilty or not guilty?

20 THE DEFENDANT: Guilty.

21 THE COURT: Count 2, principal to burglary, do
22 you plead guilty or not guilty?

23 THE DEFENDANT: Guilty.

24 THE COURT: Count 3, principal to possession of a

1 stolen firearm, do you plead guilty or not guilty?

2 THE DEFENDANT: Guilty.

3 THE COURT: And Count 4, principal to possession
4 of a stolen firearm, guilty or not guilty?

5 THE DEFENDANT: Guilty.

6 THE COURT: Go ahead and have a seat.

7 The Court has before it a guilty plea agreement
8 purportedly signed by you March 2nd, 2020. Is that your
9 signature on the guilty plea agreement?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Prior to signing this document did
12 you read it?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Did you understand what you were
15 signing?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Did you have the opportunity to
18 discuss the document with your attorney?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Did you have the opportunity to ask
21 your attorney questions, what the agreement does or does not
22 do for you?

23 THE DEFENDANT: Yes.

24 THE COURT: Has your attorney answered all of

1 your questions regarding the guilty plea agreement?

2 THE DEFENDANT: Yes.

3 THE COURT: Do you understand that matters of
4 sentencing are solely up to the Court and the Court can
5 sentence you within the range of penalties I've previously
6 described?

7 THE DEFENDANT: Yes.

8 THE COURT: Did anyone threaten you to have you
9 sign the guilty plea agreement?

10 THE DEFENDANT: No.

11 THE COURT: Did anyone make any promises to you
12 that are not contained within the written document?

13 THE DEFENDANT: No.

14 THE COURT: Mr. Mouritsen, have you gone over
15 with your client his constitutional rights under Nevada law?

16 MR. MOURITSEN: I have, your Honor. And they are
17 also included in the guilty plea agreement.

18 THE COURT: So I'm going to briefly go over those
19 rights with you again. And while doing so, if you have any
20 questions, interrupt and ask.

21 First of all, you're presumed innocent. You have
22 a right to plead not guilty. You have the right to a trial
23 within 60 days. At that trial, the State would have to prove
24 beyond a reasonable doubt through competent evidence that you

1 committed the crimes as alleged against you. You have a
2 right to be represented by an attorney, a right to confront
3 and question all the witnesses and evidence against you, a
4 right to subpoena witnesses on your own behalf and to compel
5 their attendance at trial. You have a right to remain
6 silent. If you exercise that right, no one could hold it
7 against you or comment upon it at trial. You have a right to
8 reasonable bail pending trial. Do you understand each and
9 every one of those rights?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Do you understand that by pleading
12 guilty you give up the presumption of innocence, right to
13 remain silent, right to confront evidence against you, and
14 the right to produce evidence on your own behalf?

15 THE DEFENDANT: Yes.

16 THE COURT: And do you understand that by
17 pleading guilty you waive your right to appeal your
18 conviction except on constitutional or jurisdictional
19 grounds?

20 THE DEFENDANT: Yes.

21 THE COURT: Do you understand there could be
22 other consequences such as the loss of your right to vote, to
23 become a juror, to become an administrator, to hold public
24 office, and you may have to register as an ex-felon?

1 THE DEFENDANT: Yes.

2 THE COURT: Now, if applicable, this could affect
3 your immigration status if you're not a citizen. You are
4 hereby advised the conviction for the offense of which you've
5 been charged you have the consequence of deportation,
6 exclusion from admission to the United States, or denial of
7 naturalization pursuant to the laws of the United States. Do
8 you understand that?

9 THE DEFENDANT: Yes.

10 THE COURT: And do you understand that by
11 pleading guilty to these crimes it could affect your ability
12 to possess and use firearms in the future?

13 THE DEFENDANT: Yes.

14 THE COURT: Do you understand that by pleading
15 guilty to a felony today, if you were to commit a crime in
16 the future, there might be enhanced penalties?

17 THE DEFENDANT: Yes.

18 THE COURT: Before I accept your plea, is there
19 anything about any of these rights or consequences you do not
20 understand and would like to question me further about?

21 THE DEFENDANT: No, sir.

22 THE COURT: Knowing that you have those rights,
23 having in mind the consequences of pleading guilty, do you
24 still wish to voluntarily waive your rights and have me

1 accept your plea of guilty to the charges?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Are you now under the influence of
4 intoxicating liquor or drugs, and that includes marijuana?

5 THE DEFENDANT: No, sir.

6 THE COURT: Are you taking any prescribed
7 medication?

8 THE DEFENDANT: No, sir.

9 THE COURT: Before I can accept your plea, I need
10 to know on or about or between the 1st day of December, 2019,
11 and the 2nd day of January, 2020, did you wilfully and
12 unlawfully -- Excuse me. Did you wilfully, unlawfully, and
13 knowingly possess 14 grams or more but less than 28 grams of
14 methamphetamine at or near 2920 West First Street in Silver
15 Springs?

16 THE DEFENDANT: Yeah.

17 THE COURT: And you knew it was methamphetamine?

18 THE DEFENDANT: What was that, sir?

19 THE COURT: You knew it was methamphetamine?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: And how did you possess it?

22 THE DEFENDANT: It was in a bag.

23 THE COURT: Okay. And the bag was on your person
24 or under your dominion and control?

1 THE DEFENDANT: It was in the house.

2 THE COURT: In the house? You were in the house?

3 THE DEFENDANT: I was in the house, yes.

4 THE COURT: All right. Count 2, I need to know
5 on or about the 1st day of December, 2019, 2nd day of
6 January, 2020, did you enter a structure owned by Jean Kelly
7 or someone else and steal firearms at or near 2585
8 Ramsey-Weeks Cutoff in Silver Springs?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Count 3, principal to possession of
11 stolen firearm, on or about the 2nd day of January, 2020, did
12 you possess or withhold a stolen Springfield XD 40, serial
13 number MG124317 firearm?

14 THE DEFENDANT: Yeah.

15 THE COURT: All right. And that was at or near
16 2920 West First Street?

17 THE DEFENDANT: Yeah.

18 THE COURT: And you knew that weapon was stolen
19 or you had reason to believe it was stolen?

20 THE DEFENDANT: Sure.

21 THE COURT: All right. Count 4, same crime. I
22 need to know on or about the same date, January 2nd, 2020,
23 did you possess or withhold the stolen H&K 40 serial number
24 22091104 firearm?

1 THE DEFENDANT: Yes.

2 THE COURT: And did you know that that was stolen
3 or did you have reason to believe that it was stolen?

4 THE DEFENDANT: Yep.

5 THE COURT: All right. The Court finds a factual
6 basis for the pleas have been made freely, voluntarily, and
7 intelligently, and direct the clerk to enter the pleas in to
8 the minutes of the court. And do we have a date for
9 sentencing?

10 MR. MOURITSEN: Your Honor, if we can set that
11 for the afternoon that day for restitution hearing as well.

12 THE COURT: Okay. So what day?

13 THE CLERK: Let me look at that real quick.

14 MR. MOURITSEN: And if I can discuss custody
15 status, your Honor.

16 THE COURT: Hold on. Let's get the date.

17 THE CLERK: We can do April 20th.

18 MR. MERRILL: What time?

19 THE COURT: 1:30.

20 MR. MOURITSEN: April 20th, your Honor?

21 THE COURT: 1:30. Is that enough time for the
22 Division to get a PSI?

23 THE PROBATION OFFICER: Yes, your Honor.

24 THE COURT: All right. Go ahead as to the

1 custody.

2 MR. MOURITSEN: Your Honor, in this case,
3 Mr. Werre has a hold out of California for a felony probation
4 matter. I would like him to be able to resolve that matter
5 as well as resolve any underlying family issues that he has
6 because he'll likely be facing significant time in custody on
7 this case. And I would ask that he be able to resolve those
8 matters prior to returning for sentencing. I would ask for
9 an OR release to allow him to go to California on that hold
10 to resolve those matters and as well as resolve family
11 matters.

12 THE COURT: The State's position?

13 MR. MERRILL: Your Honor, we would be opposed to
14 that. With the probation hold or parole hold he may get back
15 out in California and then not ever come back here for a
16 significant time. Additionally, I believe he has three prior
17 felonies, one he's on parole for right now.

18 THE COURT: All right. I'm going to deny the
19 request. We'll get everything done by April 20 and you can
20 address the California issues. All right. Anything else?

21 MR. MERRILL: No, your Honor.

22 MR. MOURITSEN: Thank you, your Honor.
23
24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

STATE OF NEVADA)
) ss.
COUNTY OF LYON)

I, CHRISTY Y. JOYCE, Certified Court Reporter
of the Third Judicial District Court of the State of Nevada,
in and for Lyon County, do hereby certify:

That I was present in Department II of the
above-entitled court and took stenotype notes of the
proceedings entitled herein, and thereafter transcribed the
same into typewriting as herein appears;

That the foregoing transcript is a full, true,
and correct transcription of my stenotype notes of said
proceedings.

Dated at Reno, Nevada, this 2nd day of March,
2020.

Christy Joyce/
CHRISTY Y. JOYCE, CCR #625

FILED

2020 APR 28 PM 2:18

JANIS BOGERT
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

CLERK OF COURT
DEPUTY

Case No. 20-CR-00234

Dept No.

DA Case No. S20.0013

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

THE STATE OF NEVADA,

Plaintiff,

vs.

ERIC DEAN WERRE,

Defendant.

JUDGMENT OF CONVICTION

On March 2, 2020 the above-named Defendant, **ERIC DEAN WERRE**, Date of Birth: April 15, 1986, entered an Guilty plea to the crimes of **COUNT I: TRAFFICKING IN CONTROLLED SUBSTANCES: FLUNITRAZEPAM, GAMMA-HYDROXYBUTYRATE AND SCHEDULE I SUBSTANCES, EXCEPT MARIJUANA, (LEVEL II) MORE THAN 14 GRAMS, BUT LESS THAN 28 GRAMS, a CATEGORY B FELONY**, in violation of NRS 453.3385(1)(b) **COUNT II: PRINCIPAL TO BURGLARY, GAINING POSSESSION OF A FIREARM AND/OR DEADLY WEAPON, a CATEGORY B FELONY**, in violation of NRS 205.060, NRS 205.060(4) and NRS 195.020; **COUNT III: PRINCIPAL TO STOLEN FIREARM, a CATEGORY B FELONY**, in violation of NRS 205.275, NRS 205.275(2)(c) and NRS 195.020; **COUNT IV: PRINCIPAL TO POSSESSION OF STOLEN FIREARM, a CATEGORY B FELONY**, in violation of NRS 205.275, NRS 205.275(2)(c) and NRS 195.020

Further, that at the time the Defendant entered the plea, this Court informed the Defendant of the privilege against compulsory self-incrimination, the right to a speedy

1 trial, the right to a trial by jury, the right to compulsory process to compel witnesses to
2 testify on behalf of the Defendant, and the right to confront the accusers. That after
3 being so advised, the Defendant stated that these rights were understood and still
4 desired this Court to accept the plea of Guilty.

5 Further, that at the time the Defendant entered a plea, and at the time of
6 sentencing, the Defendant was represented by AARON MOURITSEN; also present in
7 Court were the Lyon County Clerk, or the duly appointed representative; the Sheriff of
8 Lyon County, or the duly appointed representative; the District Attorney of Lyon
9 County, Nevada, or the duly appointed representative, representing the State of
10 Nevada; and the Operations Supervisor, or the duly appointed representative,
11 representing the Division of Parole and Probation.

12 This Court having accepted the Defendant's plea, and having set the date of
13 April 20, 2020, as the date for imposing judgment and sentence and the Defendant
14 having appeared at such time, represented by counsel, and the Defendant having
15 been given the opportunity to exercise the right of allocution, and having shown no
16 legal cause why judgment should not be pronounced at that time.

17 This Court thereupon pronounced **ERIC DEAN WERRE** guilty of the crimes of
18 **COUNT I: TRAFFICKING IN CONTROLLED SUBSTANCES: FLUNITRAZEPAM,**
19 **GAMMA-HYDROXYBUTYRATE AND SCHEDULE I SUBSTANCES, EXCEPT**
20 **MARIJUANA, (LEVEL II) MORE THAN 14 GRAMS, BUT LESS THAN 28 GRAMS, a**
21 **CATEGORY B FELONY, in violation of NRS 453.3385(1)(b)COUNT II: PRINCIPAL**
22 **TO BURGLARY, GAINING POSSESSION OF A FIREARM AND/OR DEADLY**
23 **WEAPON, a CATEGORY B FELONY, in violation of NRS 205.060,NRS 205.060(4)**
24 **and NRS 195.020; COUNT III: PRINCIPALTO STOLEN FIREARM, a CATEGORY B**
25 **FELONY, in violation of NRS 205.275, NRS 205.275(2)(c) and NRS 195.020;**
26 **COUNT IV: PRINCIPAL TO POSSESSION OF STOLEN FIREARM, a CATEGORY**
27 **B FELONY, in violation of NRS 205.275, NRS 205.275(2)(c) and NRS 195.020**
28

1 In accordance with the applicable statutes of the State of Nevada this Court
2 sentenced the Defendant to:

3 **Count I:**

4 Imprisonment in the Nevada State Prison for a minimum term of Seventy-Two
5 (72) Months, with a maximum term of One Hundred and Eighty (180) Months,
6 and a minimum parole eligibility of Seventy-Two (72) Months

7 **Count II:**

8 Imprisonment in the Nevada State Prison for a minimum term of Seventy-Two
9 (72) Months, with a maximum term of One Hundred and Eighty (180) Months,
10 and a minimum parole eligibility of Seventy-Two (72) Months, consecutive to
11 Count I

12 **Count III:**

13 Imprisonment in the Nevada State Prison for a minimum term of Thirty-Six (36)
14 Months, with a maximum term of One Hundred and Twenty (120) Months, and a
15 minimum parole eligibility of Thirty-Six (36) Months, concurrent to Count I and Count
16 II

17 **Count IV:**

18 Imprisonment in the Nevada State Prison for a minimum term of Thirty-Six (36)
19 Months, with a maximum term of One Hundred and Twenty (120) Months, and
20 a minimum parole eligibility of Thirty-Six (36) Months, concurrent to Count I,
21 Count II and Count III

22 The aggregate sentence is a MAXIMUM TERM OF THREE HUNDRED AND
23 SIXTY (360) MONTHS with a MINIMUM parole eligibility of ONE HUNDRED
24 AND FORTY-FOUR (144) MONTHS in the Nevada Department of Corrections.

25 The Defendant is given credit for One Hundred and Nine (109) days of pre-
26 sentence incarceration time served. The Court further exonerated any bond
27 heretofore posted.

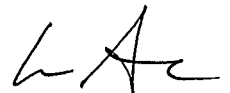
28 In addition, said Defendant shall pay:

1. An Administrative Assessment in the amount of Twenty-five Dollars (\$25.00)
2. A Chemical Analysis in the amount of Sixty Dollars (\$60.00)
3. A DNA Fee in the amount of One Hundred Fifty Dollars (\$150.00)
4. A Genetic Marker Fee in the amount of Three Dollars (\$3.00)
5. A Restitution in the amount of One Hundred Thirteen Thousand One Hundred Thirty-seven Dollars And Seven Cents (\$113,137.07) joint and several with Chandy Atkins and Mark Kennedy; victim Gene Kelly
6. A Restitution in the amount of Thirty Dollars (\$30.00) joint and several with Chandy Atkins and Mark Kennedy; victim Ron Hennessey

Pursuant to NRS 176.0913, Defendant must submit a biological specimen to determine genetic markers and/or secretor status.

Therefore, the Clerk of the above-entitled Court is hereby directed to enter the Judgment of Conviction as a part of the record in the above-entitled matter.

DATED: This 28^r day of April, 2020.



DISTRICT COURT JUDGE

Case No. 20-CR-00234

Department II

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF LYON, STATE OF NEVADA
BEFORE THE HONORABLE LEON ABERASTURI
DISTRICT JUDGE, PRESIDING

THE STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
ERIC DEAN WERRE,)
)
Defendant.)
_____)

TRANSCRIPT OF PROCEEDINGS
SENTENCING HEARING
MONDAY, APRIL 20, 2020
YERINGTON, NEVADA

Reported by: Shellie Loomis, RPR
Nevada CCR #228

CAPITOL REPORTERS (775) 882-5322

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

APPEARANCES:

For the State:	Matthew Merrill
	Deputy District Attorney
	Yerington, Nevada
For the Defendant:	Aaron Mouritsen
	Public Defender
	Yerington, Nevada

1 YERINGTON, NEVADA, MONDAY, APRIL 20, 2020, A.M. SESSION

2 -oOo-

3
4 THE COURT: All right. So we're going on the
5 record, 20-CR-00234. Have the parties received a copy of the
6 presentence investigation report prepared April 9, 2020?

7 MR. MERRILL: The State has.

8 MR. MOURITSEN: The Defense has.

9 THE COURT: Any factual corrections?

10 MR. MERRILL: None by the State.

11 MR. MOURITSEN: The only factual correction, Your
12 Honor, is that we come to a conclusion on restitution.

13 THE COURT: Okay.

14 MR. MOURITSEN: There are two sets of
15 restitution. The first one is \$30, and I believe the State
16 knows exactly who that is going to go to.

17 THE COURT: Okay.

18 MR. MOURITSEN: And the second number
19 \$113,137.07.

20 THE COURT: Okay. One time. So, 113 comma.

21 MR. MOURITSEN: 137.

22 THE COURT: 137.

23 MR. MOURITSEN: 07.

24 THE COURT: 07.

____CAPITOL REPORTERS (775) 882-5322_____

1 MR. MOURITSEN: And then, Your Honor, as part of
2 these negotiations, and I'm not exactly how we compute it, I
3 understand the issue of insurance is currently in litigation
4 in regards to that amount. And if he does receive that amount
5 in insurance or part of that amount, that would something we
6 can work out in restitution after.

7 THE COURT: All right. I am --

8 MR. MERRILL: Your Honor, I'm not sure, I know we
9 talked about it, you know.

10 THE COURT: Yes.

11 MR. MERRILL: See, Your Honor, we had part of
12 it --

13 THE COURT: Who do we have on Zoom?

14 THE LAW CLERK: I just have Kelly, Gene, Gene
15 Kelly.

16 THE COURT: All right.

17 THE LAW CLERK: Do you want me to admit him?

18 THE COURT: Who?

19 THE LAW CLERK: He's the victim.

20 MR. MERRILL: He's one of the victims.

21 THE COURT: All right. Go ahead and admit him.

22 MR. MERRILL: Mr. Kelly, can you hear me?

23 THE LAW CLERK: Give him one second, he's
24 connecting to audio. Now, go ahead.

1 MR. MERRILL: Mr. Kelly, can you hear me?

2 MR. KELLY: Yes, I am. I'm turning on my camera.
3 There we go.

4 THE COURT: All right. I can see Mr. Kelly on
5 the phone. All right. As to the restitution language, I'll
6 leave that up to the attorneys as to how, what credit for
7 whatever insurance.

8 And then -- all right, is Mr. Kelly going to
9 testify on something other than the restitution, or?

10 MR. MERRILL: Your Honor, Mr. Kelly was going to
11 testify about restitution and, of course, a victim impact
12 statement.

13 THE COURT: All right.

14 MR. MERRILL: I also have Mr. Ron Hennessey who
15 is in the courtroom. And he would like to make a statement as
16 well. He also had a problems with the --

17 THE COURT: Okay. But the restitution amounts
18 cover everything, so I can leave it to a victim impact, I
19 guess, that's where I'm trying.

20 MR. MERRILL: Yes, Your Honor, we have agreed
21 that the restitution should be what Mr. Mouritsen stated, the
22 113,117.07.

23 THE COURT: Okay.

24 MR. MERRILL: And that is to Gene Kelly. And

1 then \$30 as to Ron Hennessey.

2 THE COURT: All right. Who did you get want to
3 get a victim impact first?

4 MR. MERRILL: Your Honor, if we could do Eugene
5 Kelly first.

6 THE COURT: All right. So, Mr. Kelly, if you
7 would raise your right hand.

8 GENE KELLY,
9 called as a witness on behalf of the
10 STATE, was duly sworn and
11 testified as follows:

12 THE WITNESS: Yes, it is, sir.

13 THE COURT: All right. And can you hear Mr.
14 Merrill all right?

15 MR. KELLY: I can.

16 THE COURT: Okay. You can lower the hand, and
17 then, Mr. Merrill, go ahead.

18 MR. MERRILL: Thank you, Your Honor, I'm going to
19 stay seated.

20 **DIRECT EXAMINATION**

21 BY MR. MERRILL:

22 Q. Mr. Kelly, can you hear and see me?

23 A. I can hear you, I cannot see you, sir.

24 Q. Okay. So, if you can't hear me at some point,

1 just let me know, stop me and let me know and I can rephrase
2 the question?

3 A. Yes, sir.

4 Q. Where do you work?

5 A. I work in Napa, California at Collectors Arms
6 Trade Company, Incorporated.

7 Q. What is your position with Collectors Arms
8 Trading?

9 A. I am the president of the company.

10 Q. And how long have you operated that company?

11 A. About 30 plus years.

12 Q. And do you have a location here in Silver
13 Springs, Lyon County, Nevada?

14 A. Yes, we do. At 2585 Ramsey Weeks cutoff.

15 Q. And could you briefly just describe to the Court
16 what types of items you store in that location?

17 A. That location was used for storage of our video
18 inventory of DVDs, firearms and related accessories that we
19 use in our video productions for Gun Tech Video Magazine and
20 the training videos that we put out for the American
21 Gunsmithing Institute.

22 Q. And did you experience a loss of items as a
23 result of the crime?

24 A. Yes, I did.

1 Q. And can you describe for the Court in summary
2 those items?

3 A. I have submitted to the court the list of
4 firearms that I reported to both the Bureau of Alcohol,
5 Tobacco and Firearms scam, the Lyon County Sheriff's
6 Department, and the District Attorney, I think has copies of
7 those.

8 I, in addition to the firearms, we had a number
9 of items lost. Do you want me to describe some of those?

10 Q. If you could?

11 A. So starting with the damage to the building.
12 They cut locks, destroyed a rear drawer -- a door, excuse me,
13 access door, got into a shipping container that had a lock
14 box, cut the locks, got inside, took the items inside the
15 Conex Container that were not in the safes.

16 There were two safes. A personal safe which they
17 took and it has not been recovered, contained a number of
18 firearms. And a large, heavy safe that they were not able to
19 move so that they cut their way into it and removed all the
20 firearms and some ammunition and other accessories, including
21 some silver rounds that were inside that safe.

22 We also lost a bar of silver that I had in a
23 drawer, in a desk drawer, they took trophies, some trophies,
24 and they took a number of support accessories, magazines, some

1 parts and, let's see, what else.

2 They broke their way into a truck that I had with
3 a service-type shell on the back of a truck and stole tools
4 that were inside that truck.

5 They damaged the alarm system. They cut the
6 phone lines and then damaged the wires and taking a camera and
7 destroying some of the contacts.

8 Let's see, what else. That is the bulk of it. I
9 might point out the safe alone, I know they already talked
10 about restitution, but the safe alone was almost \$10,000,
11 \$9538.00 is the bid I have to replace it.

12 So, I mean, the damage was significant. It was
13 focused. The theft was comprehensive.

14 Q. And in total, how many guns were stolen from your
15 unit?

16 A. I haven't -- I -- on a separate count right here,
17 but approximately in round numbers, 100 firearms. There have
18 been a few that were recovered by the Sheriff's Department and
19 the Bureau of Alcohol, Tobacco and Firearms, but only a
20 handful compared to what was stolen.

21 What particularly bothers me, so I don't forget
22 to say it, is that not only were these firearms stolen, not
23 only do we have a loss financially, but these firearms were
24 then apparently --

1 MR. MOURITSEN: Your Honor, I'm going to object
2 as to hearsay.

3 THE COURT: Okay. All right. Do you know --

4 MR. MOURITSEN: Beyond the facts.

5 THE COURT: Sir, do you know these items of your
6 own, or have you been told what happened to the guns after
7 they were stolen?

8 THE WITNESS: I have been told, you are correct.

9 THE COURT: Okay. All right. So, I'm going to
10 sustain the hearsay objection. Ask another question, Mr.
11 Merrill.

12 THE WITNESS: May I say something a different
13 way, Your Honor?

14 THE COURT: Wait for a question.

15 BY MR. MERRILL:

16 Q. Mr. Kelly, how has this crime, how has this
17 affected your business?

18 A. A significant impact to my business. We learned
19 of the theft on the 30th of December. I immediately reported
20 it to the ATF. They instructed me that I had to report all
21 the weapons that were lost in my inventory within 48 hours or
22 I could be charged with a felony.

23 Unfortunately, the log books had been stolen as
24 part of the theft to cover their tracks. Luckily, I had taken

1 digital photos of those log books and it was from that and
2 other information that I had, was able to reconstruct all of
3 this -- a great deal of stress, let's just put it that way.

4 I ended up spending my New Year's Eve up there in
5 Yerington -- I mean Silver Springs instead of at home with my
6 family.

7 I couldn't do my end of the year tax planning for
8 the corporation which costs a significant amount. Both with
9 my CPS doing rush work and also, you know, deductions we can
10 take at the end of the year and so on.

11 That's when I was going to do all my business
12 planning for the beginning the first quarter of the year. We
13 couldn't do that. We ended up having a very rough first
14 quarter.

15 My staff has been distracted by this. We no
16 longer feel like we have a safe building that we can use up
17 there. It goes on.

18 There's a lot of emotional impact on this as well
19 as financial impact to the business. And it greatly offends
20 me if anybody else were able to -- were to use any of these
21 firearms in a wrongful way.

22 There's a screen up on my screen right now, so I
23 can't see. Virus --

24 Q. There's a screen up on your screen?

1 A. Okay. I closed it. Let me -- I thought it was
2 someone else. I'm going to move it off. There we go, sorry.
3 Go ahead.

4 Q. So, Mr. Kelly, how did this affect you
5 personally?

6 A. I lost sleep over it. I lost -- I ended up
7 having to travel to Nevada on a couple of unplanned trips,
8 including, you know, flying up from Las Vegas during the first
9 day of the biggest trade show of the year for us and having to
10 miss that entire day, because I had to leave at oh dark thirty
11 in the morning, early in the morning, fly up to Reno, drive
12 over to Yerington, testify and turn around and get back.

13 I'm still upset over this. And, you know, some
14 of the firearms that were stolen had personal meaning to me,
15 including a couple that are irreplaceable.

16 One of them was a cased commemorative carbine, M1
17 carbine that was for the Band of Brothers commemorative.
18 There were only 101 of them made, because they were part of
19 the Band of Brothers, the 101st Airborne.

20 But what was significant is this carbine was
21 signed by eight of those war heroes, the original guys from
22 Easy Company. And they have all, I believe all of them have
23 since passed away.

24 This was irreplaceable and was a family treasure,

1 because we respected those people so significantly. And I'm
2 sure that it was trashed just to use as a firearm where it was
3 in a cased set with commemorative pieces.

4 There are other firearms like that are
5 irreplaceable and it angers me.

6 Q. And, Mr. Kelly, what would you like to see done
7 in this case as far as punishment?

8 A. Well, I doubt that we could do the punishment
9 that I would like because that would be very Middle Eastern.

10 So, I would say that, you know, I respect the
11 Judge to come up with something that's very significant to
12 reflect the disrespect that people have -- the Defendants have
13 for not only my property, but the property and how it could be
14 miss used by others.

15 And also the -- in general, that someone thinks
16 that they can go and steal without recourse just for their own
17 wanton needs and I'm greatly offended. I hope that the
18 message is sent in such away that they will never choose to do
19 this again.

20 And, again, we don't know what the ultimate
21 impact is. This is not like someone just stealing, you know,
22 some small, personal items. This could have significant
23 impact down the road to others.

24 Q. Mr. Kelly, is there anything else that you would

1 like to state to the Judge in regards to sentencing today?

2 A. Your Honor, I would just request that you take
3 all these things under consideration, not just the impact we
4 reported, but the potential impact that could happen because
5 of the willful acts of these people.

6 MR. MERRILL: Nothing further.

7 THE COURT: All right. Did you have any
8 questions of Mr. Kelly?

9 MR. MOURITSEN: I do not, Your Honor.

10 THE COURT: All right. Thank you, Mr. Kelly.
11 All right. Your next witness?

12 MR. MERRILL: Ronald Hennessey, come forward.

13 THE COURT: All right. Sir, if you would raise
14 your right hand.

15 RONALD HENNESSEY,
16 called as a witness on behalf of the
17 STATE, was duly sworn and
18 testified as follows:

19 THE COURT: All right. If you would make your
20 way to the witness stand, sir. Speak into the mic.

21 THE WITNESS: Okay.

22 THE COURT: All right.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 20
- 21
- 22
- 23
- 24

Q. Sir, please state your full name and spell your last for the record?

Q. And are you a victim in this case?

Q. And how are you a victim in this case?

Q. What's your association with this building?

Q. Okay. And you reside there in Silver Springs?

Q. And so what was would you like to tell the Court sentencing?

Q. Is there anything else you would like to the
to the Judge regarding sentencing, sir?

1 A. Please consider it.

2 MR. MERRILL: Nothing further, Your Honor.

3 THE COURT: Okay. Any questions, Mr. Mouritsen?

4 MR. MOURITSEN: No questions, Your Honor.

5 THE COURT: All right. Thank you, sir, you can

6 have a seat back.

7 THE WITNESS: Thank you.

8 THE COURT: Any additional witnesses for the

9 State?

10 MR. MERRILL: No, Your Honor.

11 THE COURT: Did you have any additional

12 witnesses?

13 MR. MOURITSEN: Your Honor, I do have one letter,

14 and I've shown it, and it's from Trix (ph.), his father. If I

15 can approach, I have shown it to the District Attorney.

16 THE COURT: Okay. The Court will mark it as

17 Defense --

18 THE CLERK: A.

19 THE COURT: A and admit.

20 (Exhibit A admitted into evidence.)

21 THE COURT: Okay. Any additional evidence?

22 MR. MOURITSEN: Not at this time, Your Honor.

23 THE COURT: All right. Argument from the State?

24 MR. MERRILL: Yes, Your Honor. In reviewing this

1 crime which is approximately from -- the charge that I'll
2 note, I've had the opportunity to revisit the different
3 theories of the criminal punishment. There's too many
4 theories of criminal punishment.

5 One, is the fact that we are facing the fact that
6 we are looking how can we punish the person for the crime that
7 was committed.

8 There's also the theory of forward looking, how
9 do we protect society at large, how can you rehabilitate
10 somebody to give it back on the straight and narrow of sorts,
11 so a crime like this doesn't occur again.

12 In this case, Your Honor, I believe neither one
13 is a hundred percent on par with what they've done here. I
14 believe it's a mix.

15 Let me go over the facts of the case, if I may
16 very briefly, Your Honor. There was three criminal Defendants
17 in this case. The other two Defendants have plead guilty in
18 accordance and in the next month or so we'll hear their
19 sentencing.

20 Some time in the period of mid December, this
21 Defendant here came out from California and met up with two of
22 the co-Defendants.

23 There's a metal building located a few hundred
24 yards away from the address where Mr. Werre was staying, and

1 where the two other co-Defendants resided. That metal
2 building is the metal building that Mr. Kelly was describing.
3 That's his building.

4 There was a plan. These three Defendants wore
5 black in the night time, walked across the desert and broke
6 into the building using a drill to get into the locked outside
7 door.

8 Then, inside is a Conex Container which was also
9 broken into. There was tools used, side Rykers, things of
10 that nature. The State is unaware and ATF and other
11 individuals are unaware exactly how these Defendants knew that
12 the guns were inside at this time, or if someone knew or it
13 was just a break in.

14 But they got in. There was a concerted effort
15 between this Defendant and the other two to then obtain a
16 truck and load the guns into a truck.

17 That truck was then, once it was loaded full of
18 guns and ammunition, including .50 calibers, .308s, .22s, .9
19 millimeters, AR15s, the ammunition that go along with these
20 firearms.

21 They were then taken back to the house that's
22 only a few hundred yards away. But then was planning to
23 obtain a U-Haul truck and to transfer these guns to
24 California.

1 Now, all three individuals, two inside the U-haul
2 truck and one inside another truck traveled to California
3 where these guns were then sold to Hispanic individuals
4 wearing -- at night time, wearing firearms on their hips.

5 These guns were exchanged for cash and three
6 individuals, this Defendant and two other co-Defendants
7 received cash, money for the sale of guns.

8 The guns are now -- we're uncertain where the
9 guns are, but it's -- it's fairly certain the guns are going
10 to show up in the future in future crimes.

11 Additionally, inside the house when the search
12 warrant was executed, inside the house there was
13 methamphetamine found. There was other guns found inside the
14 attic, guns found inside the garage, inside closets of this
15 house.

16 When we talk about and think about the loss, not
17 only to the individual Gene Kelly and Ron Hennessey, over a
18 hundred-thousand dollars in lost inventory, the stress things,
19 the things discussed by Kelly.

20 In consideration of that and these firearms being
21 stolen and trading on the black market is not only a threat to
22 the community and society at large, but also it's Second
23 Amendment to the two other individuals that hold the Second
24 Amendment dearly.

1 Your Honor, in this case, we're asking for on
2 Count I, 66 to 180 months.

3 On Count II, 66 to 180 months consecutive to
4 Count I.

5 Count III and IV, 48 to 120 concurrent to each
6 other. So III and IV concurrent, but consecutive to both I
7 and II.

8 And, Your Honor, we also ask that restitution be
9 joint and several with Tim Watkins and Mr. Kennedy.

10 THE COURT: Okay. Mr. Mouritsen?

11 MR. MOURITSEN: Your Honor, in this case, we're
12 going to be asking for a closer recommendation that was laid
13 out in the PSI. We're going to be asking for 36 months to
14 120 months in Count I as laid out in the presentence
15 investigation report.

16 36 on Count II, 36 months required 20 months to
17 run concurrent rather than consecutive to Count I.

18 On count III, 16 to 72 months as laid out on the
19 PSI to run concurrent instead of consecutive to Counts I and
20 II.

21 And 16 to 72 months on Count IV to run concurrent
22 instead of consecutive to Counts I, II, III, IV.

23 Your Honor, in looking at this case, I think it's
24 important to recognize the goal should not be to take such

1 action to victimize the victim again in this case.

2 As you can see from that letter, Eric has the
3 opportunity when he's released at whatever point that is to
4 get employment and start paying this restitution. Instead, it
5 will likely fall on mostly Eric to make that responsibility
6 and pay back that restitution.

7 And until Eric is out and until Eric is actually
8 working on that as far as the job opportunity to -- as well as
9 to have the skills to be able to do, it's likely the victim
10 will continue to not have that money.

11 Your Honor, the District Attorney is asking for
12 more than ten years in this case. It means it will be ten
13 years until the victim's things are returned all from that
14 restitution.

15 Instead, Your Honor, by giving him a smaller
16 amount, it gives the opportunity to work and pay that
17 restitution.

18 The second point I would make, Your Honor, is
19 that looking forward as the District Attorney is asking us to
20 do, it's important to know that Eric has a good support
21 network.

22 Both his father Rick, as well as fiancée, Ann
23 Marie, who have been in good contact with me, they're both
24 involved in this case and care deeply about what happens to

1 Eric and the opportunities that he has in the future.

2 He has a strong support network in California,
3 especially to be able to get him working and keep him out of
4 trouble once he's released and it should be looked at as a
5 reason to reduce it.

6 Finally, Your Honor, as to point number three,
7 the reason that these should be run concurrent is because
8 these all parts of the same common scheme or plan.

9 Your Honor, Count II specifically applies to the
10 burglary or the inference in order to steal the firearms.

11 When the burglary occurred, it was to steal the
12 firearms as laid out in Counts III and IV being part of the
13 same act as laid out in Counts II.

14 And all that comes together to provide the cash
15 to the Defendant, the Defendants for the controlled substances
16 that become the basis for Count I.

17 This -- these controlled substances were used to
18 a great extent to be for Eric as well as the two
19 co-Defendants' drug addiction that Eric has never really had
20 the opportunity to be able to handle.

21 He intends, once he enters prison, to be able to
22 take responsibility and to do the referred treatment programs
23 in order to reduce his time there, but also to do drug
24 programs upon his release.

1 Because all four of these counts are all part of
2 the same incident, the same plan, I think justice would demand
3 that they run together and be run concurrently rather than
4 consecutively, because they are not separate incidences that
5 occurred, but a single incident. And they also arise out of a
6 single event happening.

7 Your Honor, Eric is the most likely of the three
8 co-Defendant's to get out and be able to make something of his
9 life, and I think that should be factored in to give him the
10 opportunity to pay back the restitution. Thank you.

11 THE COURT: All right. Sir, this is your
12 opportunity, is there anything --

13 MR. MERRILL: Your Honor, just before -- we are
14 also asking for no contact, just between the Defendant and the
15 victims --

16 THE COURT: Okay.

17 MR. MERRILL: -- Mr. Hennessey and Mr. Kelly.

18 MR. MOURITSEN: And no opposition to that, Your
19 Honor.

20 THE COURT: All right, sir, this is your
21 opportunity. Is there anything you wish to state to the Court
22 before I pronounce sentence?

23 THE DEFENDANT: I want to, yeah, I thank Nevada
24 to -- for a job for working at the mines, working at the 42K

1 Mines, and so I was here for two days and waiting to hear back
2 from 42K mines (sic.) to see about my -- my job opportunity.

3 I made some dumb decisions, and I apologize for
4 it, but I would like the chance to right my wrongs and to --
5 to move past this and move on with my life.

6 THE COURT: All right. Anything else, sir?

7 THE DEFENDANT: No.

8 THE COURT: All right. I'm going to ask that you
9 remain seated.

10 Mr. Mouritsen, is there any legal cause to show
11 why judgment should not now be pronounced against your client?

12 MR. MOURITSEN: No, Your Honor.

13 THE COURT: All right. Hearing no legal cause,
14 based upon the previous pleas, in Count I, the Court
15 pronounces you guilty of the crime of trafficking in a
16 controlled substance, a violation of NRS 453.3385, a category
17 B felony.

18 Count II, the Court pronounces you guilty of
19 principle to burglary, in violation of NRS 205.060, a category
20 B felony.

21 Count III, the Court pronounces you guilty of
22 principle to possession of stolen firearm.

23 In Count IV, possession of -- principle to
24 possession of a stolen firearm, both in violation of NRS

1 205.275.

2 In accordance with the applicable statutes, Count
3 I, the Court sentences you to a minimum of 72 months to a
4 maximum of 180 months.

5 Count II, the Court sentences you to a minimum of
6 72 months to a maximum of 180 months. Count II will be
7 consecutive to Count I.

8 Count III, the Court sentences you to a minimum
9 of 36 to a maximum of 120 months and that will be consecutive
10 to Counts I and II.

11 And in Count IV, the Court sentences you to a
12 minimum of 36 to a maximum of 120 months, and that will be
13 concurrent to Counts I, II, II and IV -- I mean, Counts I, II
14 and III.

15 Credit for time served, 109 days. Based upon the
16 severity of the crimes, based upon the criminal history of the
17 Defendant in which the footnotes, several probation
18 violations, previous felony, the Court will not grant the
19 privilege of probation on the non-trafficking.

20 MR. MERRILL: Your Honor, we have the AA fee --

21 THE COURT: A little louder.

22 MR. MERRILL: -- AA fee.

23 THE COURT: Okay, yeah. The AA fee -- let me
24 pull that up. All right. AA fee, 25. DNA admin fee three.

1 Chem drug analysis 60. DNA 150. I'm not going to award an
2 attorney fee based upon the large amount of restitution, that
3 the Court will accept the stipulations in the amount of, was
4 it \$30 and the -- what was the number one more time? 113 --

5 MR. MERRILL: 113.137.07.

6 THE COURT: Okay. Did you get that?

7 THE CLERK: Um-hum.

8 THE COURT: Okay. All right. Is there anything
9 else I need to address?

10 MR. MOURITSEN: No, Your Honor.

11 MR. MERRILL: No, Your Honor.

12 THE COURT: All right. Sir, I wish you the best
13 of luck, but I agree with the State and I agree with Mr. Kelly
14 in terms of this is a horrific crime so I hope you find your
15 ways and I hope when you get out you do something positive
16 with your life.

17 MR. MERRILL: No contact with the victim.

18 THE COURT: No contact with the victim and you're
19 remanded to the sheriff. All right.

20 Mr. Kelly, we're going to hang up the Zoom for
21 you, okay.

22 (Proceedings concluded.)
23
24

1 STATE OF NEVADA)
)
2 COUNTY OF LYON)

3
4 I, Michel Loomis, Certified Shorthand Reporter of
5 the Third Judicial District Court of the State of Nevada, in
6 and for Lyon County, do hereby certify:

7 That I was present in Department II of the
8 above-entitled Court and took stenotype notes of the
9 proceedings entitled herein to the best of my ability, and
10 thereafter transcribed the same into typewriting as herein
11 appears;

12 That the foregoing transcript is a full, true and
13 correct transcription of my stenotype notes of said
14 proceedings.

15 DATED: At Carson City, Nevada, this 25th day of
16 April, 2020.

17
18 //SHELLIE LOOMIS//
19 Shellie Loomis, RPR
20 Nevada CCR No. 228
21
22
23
24

Case No: 20-CR-00234

Dept. No. II

FILED

2020 APR 28 PM 2:18

TANYA BELMONT
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

TANYA BELMONT DEPUTY

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF LYON

* * * *

STATE OF NEVADA,

Plaintiff,

vs.

ERIC DEAN WERRE.,

Defendant.

**ORDER CLARIFYING ORAL
PRONOUNCEMENT AT
SENTENCING**

On April 20, 2020, the above-entitled matter came before the Court for sentencing. The Court stated from the bench that Count III was to be consecutive to Counts I and II. The Court misspoke as it was the intent of the Court to have Counts III and IV run concurrent with Counts I and II. The Court realized the error upon reviewing its notes after the proposed judgment of conviction was filed.

The Court intended to have the Defendant serve a minimum sentence of one hundred forty four (144) months and a maximum sentence of three hundred sixty (360) months. The Court has signed and filed a Judgment of Conviction which recognizes the Court's intent.

DATED: this 28th day of April, 2020.


HON. LEON ABERASTURI
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I, Kelsa Carbajal, am an employee of the Honorable Leon Aberasturi, District Judge, and that on this date, pursuant to NRCP 5(b), I deposited for mailing at Yerington, Nevada, a true copy of the foregoing document addressed to:

Lyon County District Attorney
**Placed in respective box at TJDC*

Aaron Mouritsen, Esq.
**Placed in respective box at TJDC*

DATED this 28th day of April, 2020.



Employee